



Advisory Centre on WTO Law

Centre Consultatif sur la Législation de l'OMC

Centro de Asesoría Legal en Asuntos de la OMC

# Course on WTO Law and Jurisprudence

## Part I: Basic WTO Legal Principles

### Public Policy Exceptions (Part II)

**Session 12**

4 February 2016

# AGENDA

- Order of Analysis under Article XX.
- Article XX(a), (b) and (d) and (g):
  - The elements of Article XX(a)
  - The elements of Article XX(b)
  - The "necessity test"
  - The elements of XX(d)
  - The elements of XX(g).
- The *chapeau* of Article XX

# ORDER OF ANALYSIS

- **Reminder:** In *US – Gasoline*, the Appellate Body stated the structure of Article XX determines the order of analysis to be followed in examining measures.
- First, a panel must determine whether the measure is inconsistent with a Member's GATT obligations.
- If it is inconsistent, a panel must then assess whether the measure is justified under Article XX in a two-tiered analysis:
  - Does the measure fall within the scope of one of the sub-paragraphs in order to enjoy **provisional** justification ?
  - If yes, does the measure fully meet the requirements of the *chapeau* of Article XX?

# ARTICLE XX

Article XX	GENERAL POLICY OBJECTIVES	PRODUCT-SPECIFIC POLICY OBJECTIVES	RELATION TO MEASURE REQUIRING JUSTIFICATION
(a)	<b>Public morals*</b>		<b>Necessary to...</b>
(b)	<b>Life and health*</b>		<b>Necessary to...</b>
(c)		Importation or exportation of gold and silver*	Relating to...
(d)	<b>Law enforcement*</b>		<b>Necessary to...</b>
(e)		Products of prison labour	Relating to...
(f)		<i>National treasures*</i>	Imposed for the protection of...
(g)		<b>Natural resources*</b>	<b>Relating to</b> the conservation of...
(h)		<i>Commodity agreements*</i>	Undertaken in pursuance of..
(i)		<i>Domestic materials*</i>	Involving restrictions on export of...
(j)		<i>Products in short supply*</i>	Essential to...

*Provisions interpreted by the Appellate Body in bold. Provisions applied mainly or exclusively to export restrictions in italics\**

# ARTICLE XX(a):PUBLIC MORALS

- Article XX(a) allows Members to adopt measures: "necessary to protect public morals".
  - What kind of measures come within the scope of this exception?
  - Policy objective pursued by the measure must be the protection of public morals and the measure must be *necessary* to achieve that purpose.
  - What are public morals? Are they the same for every country? Can this be objectively determined?

## ARTICLE XX(a):PUBLIC MORALS

- *Consider:* a ban on horror comics, offensive literature, obscene films, a ban on alcoholic beverages, a ban on the sale of books that are considered holy.
- Only two disputes relating to Article XX(a) and the equivalent Article XIV(a) of the GATS: *EC – Seal Products* and *US – Gambling*.

# ARTICLE XX(a):PUBLIC MORALS

## ■ *US – Gambling*

- US had argued that the remote supply of gambling and betting services raises significant concerns relating to protection of public morals (and public order).
- Linked gambling to various forms of criminal activity, especially organized crime.
- Argued that maintaining a society free of the "destructive influence" of organized crime and protecting children from gambling was essential to public order and to public morals.

## ARTICLE XX(a):PUBLIC MORALS

"The content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural and ethical and religious values. ... Members have the right to determine the level of protection that they consider appropriate. More particularly, Members should be given some scope to define and apply for themselves the concepts of 'public morals' ... in their respective territories, *according to their own systems and scales of values.*" Panel Report, *US – Gambling*, para. 6.461.

AB agreed with this reasoning, applied to it *EC – Seal Products* as well.

# ARTICLE XX(a):PUBLIC MORALS



**STOP CLUBBING, BABY SEALS**

once again, punctuation makes all the difference...

# ARTICLE XX(a):PUBLIC MORALS



# ARTICLE XX(b): PUBLIC HEALTH

- *EC – Seal Products* (Panel)
  - Panel asked to examine whether the EU public's concerns on seal welfare "fall within the scope of 'public morals' in the EU (that is, whether they are "anchored in the morality of European societies").
  - The Panel discerned from the text that "in designing the Regime, the EU sought to address the public concerns on seal welfare" and said, "taken as a whole," it illustrates "'standards of right and wrong conduct maintained by or on behalf of [the European Union]' concerning seal welfare." Panel Report, para. 7.409.

# ARTICLE XX(b): PUBLIC HEALTH

- *EC – Seal Products (AB)*

"The notion of risk in the context of Article XX(b) is difficult to reconcile with the subject matter of protection under Article XX(a), namely, public morals. ... We do not consider that the term "to protect", when used in relation to "public morals" under Article XX(a), required the Panel, as Canada contends, to identify the existence of a risk to EU public moral concerns regarding seal welfare."

AB Report, para. 5.198.

# ARTICLE XX(b: PUBLIC HEALTH

- Article XX(b) allows Members to adopt measures: "necessary to protect human, animal or plant life and health."
  - What kind of measures are covered under Article XX(b)?
  - Policy objective pursued by the measure must be the protection of the life and health of humans, animals, or plants, and the measure must be *necessary* to achieve that purpose.
  - As with public morals, there has been some deference to Members in respect of measures to reduce pollution, measures to reduce cigarette smoking, measures to eliminate risk arising from accumulation of waste in tyres.

# ARTICLE XX(b): PUBLIC HEALTH

- *Brazil - Retreaded Tyres*

- Brazil argued that the accumulation of waste tyres creates a risk of mosquito-borne diseases such as dengue and yellow fever. Accumulation of tyres also created a risk of tyre fires and toxic leaching.
- Mosquito-borne diseases also cause harm to animals , and hazardous substances contained in toxic plumes emitted from tyre fires harm animal and plant life or health.
- Panel stated: Brazil's policy of reducing exposure to risks to human or plant life or health arising from the accumulation of waste tyres falls within the range of policies covered by Article XX(b). (Panel Report, para. 7.102)

# THE NECESSITY TEST

- Can *any measure* be justified under Article XX (a) and Article XX (b)?
- If WTO Member X imposes an extra surcharge on foreign products, inconsistently with Article III:4, and the revenues are specifically channeled towards the national health and moral education budget items, can that measure be justified under Article XX(a) and XX (b)?

# THE NECESSITY TEST

- Only those measures that are "necessary" to the protection of the public policy objectives at issue will be covered. Measures thus need to pass the "necessity test".
  
- Factors to determine whether a measure is *necessary*:
  1. the relative importance of the common interests or values that the underlying law or regulation to be enforced is intended to protect;
  2. the extent to which the measure contributes to securing compliance with the objective pursued – material contribution;
  3. the extent to which the measure has a restrictive impact on international commerce, *i.e.*, intense or broad restrictive effects on imported goods; and
  4. Are there reasonably available alternatives available, which make an equivalent contribution to the objective pursued?

# THE NECESSITY TEST

- In sum, what is required is a "weighing and balancing" in a *holistic* manner to determine whether a measure is necessary.
- Test developed in *Korea – Beef* and *Brazil – Tyres* has been applied to all instances where "necessary" appears in Article XX, so it applies to (a) protection of public morals (b) protection of life and health and (d) legal enforcement, most recently in *EC – Seals*.

# 1. HOW IMPORTANT IS THE PROTECTED VALUE?

- *EC – Asbestos*: the more important the policy pursued, the easier it will be to prove that a measure is necessary to meet those objectives; the preservation of human life or health is a value that is both "vital and important" in the "highest degree".
- *Canada – Wheat Board*: measure ensures the quality of Canadian grain, and protect consumers against misrepresentation. These interests, which appear to be essentially commercial in nature, are important but are not as important as, for instance, the protection of human life and health against a life-threatening health risk.
- *Dominican Republic – Cigarettes*: the fight against tax evasion and smuggling is a most important interest for any country and particularly for a developing country.

## 2. TO WHAT EXTENT DOES THE MEASURE CONTRIBUTE TO THE POLICY OBJECTIVE?

- To be *necessary*, the measure must make a contribution to the policy goal.
- A contribution exists when there is a *genuine relationship* of "ends and means" between the objective pursued and the measure at issue.
- *Korea – Beef*: the test was "to what extent" does the measure make a contribution to the policy objective.

## 2. TO WHAT EXTENT DOES THE MEASURE CONTRIBUTE TO THE POLICY OBJECTIVE?

- *Brazil – Tyres*: test seemed to move to: is the measure ""apt to" induce changes over time in the behaviour and practices of commercial actors in a manner contributing to the objective ?
- *EC – Seals*: Panel concluded that the prohibitive aspect of the EU Seal Regime "makes a contribution" to reducing the demand for seal products within the European Union, and contributes "*to a certain extent*" to reducing global demand.

## 2. TO WHAT EXTENT DOES THE MEASURE CONTRIBUTE TO THE POLICY OBJECTIVE?

- *EC – Seals*: Panel concluded that the prohibitive aspect of the EU Seal Regime "makes a contribution" to reducing the demand for seal products within the European Union, and contributes "*to a certain extent*" to reducing global demand.
- AB rejected that Panel should have established whether measure made a *material* contribution: said a measure's contribution is only one component of the *necessity calculus* under Article XX.

### 3. TO WHAT EXTENT DOES THE MEASURE HAVE A RESTRICTIVE IMPACT ON INTERNATIONAL COMMERCE?

- *Korea – Beef*: a measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader effects.
- *Brazil – Tyres*: the more restrictive the impact of the measure at issue on trade, the more difficult it will be to argue that a measure is "necessary".
- *EC – Seals*: the contribution made by the "ban" to the identified objective must be shown to be at *least material* given the extent of its trade restrictiveness.

## 4. ARE THERE ALTERNATIVE MEASURES?

- Having determined that a measure is necessary, the conclusion is then supposed to be confirmed by examining alternative measures that are less-trade restrictive.
  - Such an alternative can only be one that is "reasonably available".
  - To be reasonably available, a measure must be "implementable", meaning that the difficulty of implementation may be taken into account.
  - Panel will also consider the extent to which the alternative measure contributes to the objective pursued by the measure at issue.

# ARTICLE XX(d) OF THE GATT 1994

- Article XX(d) of the GATT 1994 allows Members to adopt measures:

"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"

# ARTICLE XX(d) OF THE GATT 1994

## **Three-part test under sub-paragraph (d):**

1. The measure must be designed to secure compliance with national laws or regulations, such as customs laws, intellectual property laws, or prevention of deceptive practices.
  2. Those laws and regulations must not be inconsistent with provisions of the GATT 1994.
  3. The measure must be necessary to secure compliance with those laws or regulations (Appellate Body Report, *Thailand – Cigarettes*, para. 163).
- What is the trade-policy rationale for Article XX(d)?

# RATIONALE FOR ARTICLE XX(d)

- In some situations, a GATT-consistent measure can only be enforced through a GATT-inconsistent measure.
- **Example:**
  - Under the TRIPS Agreement, Members are required to ensure effective protection against infringements of IP rights. They must adopt procedures enabling an IP right holder to request the seizure of goods carrying counterfeit trademarks, pirated copyright goods, or goods infringing patents.
  - On the basis of these procedures, the customs authorities of a Member may seize generic drugs or pirated DVDs in transit violating that Member's patent or copyright laws. Would this measure be consistent with Article V:2 of the GATT 1994 ("there shall be freedom of transit ... for traffic in transit")?
  - The Member may, however, try to justify this measure under Article XX(d), as a measure that ensures compliance with its domestic laws.

# RATIONALE FOR ARTICLE XX(d)



# FIRST ELEMENT OF THE TEST

- The measure must be an "enforcement mechanism" designed to secure compliance with domestic laws and regulations (GATT Panel Report, *EEC-Parts and Components*, para. 5.17; Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.175).
- The respondent must identify precisely the "laws and regulations" with which the challenged measure seeks to secure compliance (Appellate Body Report, *Thailand – Cigarettes*, para. 179).

# FIRST ELEMENT OF THE TEST

- In *Colombia – Ports of Entry*, throughout its main written submissions, Colombia referred generally to its "laws and regulations relating to customs enforcement", which total thousands of pages. Only at a late stage of the proceeding, Colombia identified a number of specific provisions of its customs laws and regulations (Panel Report, *Colombia – Ports of Entry*, paras. 7.516-7.521).
- The laws and regulations must be distinguished from general objectives of those laws (GATT Panel Report, *EEC-Parts and Components*, para. 5.16).

# FIRST ELEMENT OF THE TEST

- Can a Member invoke Article XX(d) to induce another Member's compliance with its international obligations vis-à-vis the first Member, for example under an RTA? In *Mexico – Taxes on Soft Drinks*, Mexico invoked Article XX(d) to defend its discriminatory taxes as a measure necessary to secure compliance of the United States with the NAFTA. Did Mexico use Article XX(d) correctly? What are the systemic implications of Mexico's argument?
- Both the panel and AB rejected Mexico's argument: "laws and regulations" refer to rules that form part of the domestic legal system, and thus encompass the rules adopted by a WTO Member's legislative or executive branches of government.

## FIRST ELEMENT OF THE TEST

- If Mexico's argument were accepted and "international obligations" were those set out in the WTO Agreement, Members could evade DSU rules on retaliation.
- In addition, WTO panels and AB would have to adjudicate non-WTO disputes, as they would have to determine whether a violation of a non-WTO agreement occurred, and triggered the application of Article XX(d) (Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 77-78).

## FIRST ELEMENT OF THE TEST

**Examples of measures that were found to be designed to secure compliance with WTO-consistent laws or regulations:**

Panel Report, *Korea – Beef*, para. 658:

- Dual retail system for domestic and foreign beef (i.e. sale in different retail outlets) was a measure taken to enforce the "Unfair Competition Act", which aims at preventing misleading consumers as to the place of origin of the goods.

# FIRST ELEMENT OF THE TEST

Panel Report, *Colombia – Ports of Entry*, paras. 7.533-543:

- In light the fact that the imposition of the "ports of entry" measure was imposed at a time when customs fraud-related problems existed and the "coordinated effort" was undertaken by Panama and Colombia on this issue, the measure was imposed with a view to addressing the need to strengthen and improve customs controls related to the importation of subject products (textiles, apparel and footwear ) from Panama.

**Note that these measures were not found to be "necessary", and hence did not satisfy all the requirements of Article XX(d).**

## SECOND ELEMENT OF THE TEST

- **The laws and regulations with which the Members claim their measures secure compliance must themselves be GATT-consistent:**
  - Can the respondent rely on the presumption that a Member's laws and regulations are presumed to be GATT/WTO consistent, unless proven otherwise to demonstrate that its challenged measure satisfies this element of the test?

## SECOND ELEMENT OF THE TEST

- In *Colombia – Ports of Entry* (para. 7.531), the Panel held:

"As Panama points out, Colombia's customs laws and regulations total thousands of pages and therefore, it is not possible for the Panel to examine every provision of Colombia's customs laws and regulations in order to determine whether they are GATT-consistent. However, the Panel does not consider it necessary to complete a comprehensive review. As pointed out by Colombia, the Appellate Body has stressed that a responding Member's law will be treated as WTO-consistent until proven otherwise".

## THIRD ELEMENT OF THE TEST

- Is the measure **"necessary"** to secure compliance with the laws or regulations:
  - Relative importance of the common interests or values that the underlying law or regulation is intended to protect.
  - The extent to which the measure contributes to securing compliance with the law or regulation.
  - The extent to which the measure has a restrictive impact on international trade.
  - Are there less trade-restrictive alternatives available?

## ARTICLE XX(g) OF THE GATT 1994

- Article XX(g) of the GATT 1994 allows Members to adopt measures:

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

# ARTICLE XX(g) OF THE GATT 1994

## ■ **Three-part test under sub-paragraph (g):**

1. Is the measure concerned with the "conservation of exhaustible natural resources"?
  2. Does the measure "relat[e] to" the conservation of exhaustible natural resources? and
  3. Is the measure "made effective in conjunction with restrictions on domestic production or consumption"? (Appellate Body Report, *US – Shrimp*, paras. 127, 135, 143).
- What is the trade-policy rationale for Article XX(g)?

## RATIONALE FOR ARTICLE XX(g)

- Through this provision, the GATT 1994 recognizes Members sovereign right "to develop conservation policies on the basis of ... a full range of policy considerations and goals, including the need to preserve resources in their current state as well as the need to use them in a sustainable manner", provided that they do so in a WTO-consistent manner (see Panel Report, *China – Rare Earths*, paras. 7.266-270; see also GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6).

## RATIONALE FOR ARTICLE XX(g)

- In a number of disputes, panels interpreted this provision in light of the principle of permanent sovereignty over natural resources, and came to the conclusion that this principle and Article XX(g) operate in harmony (Panel Reports in *China – Rare Earths*, paras. 7.266-270; *China – Raw Materials*, para. 7.381).
- The AB did not opine on this issue.

## FIRST ELEMENT OF THE TEST

- What is the meaning of the concept of "exhaustible natural resources"?
- In *US – Shrimp*, the complainants argued that this concept covers "mineral" or "non-living" natural resources, and does cover the conservation of "living" resources, such as sea turtles.
- The Appellate Body adopted a broad, "evolutionary" interpretation of the concept of "exhaustible natural resources", in light of the contemporary concerns of WTO Members. The Appellate Body consulted a number of non-WTO legal instruments defining this concept, such as the 1982 LOSC and Agenda 21 (paras. 129-134).

# FIRST ELEMENT OF THE TEST

- The AB stated: "We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. ... [L]iving species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources" (para. 128).
- Other examples of "exhaustible natural resources" addressed in WTO case law are: mineral resources (*China – Raw Materials*) and clean air (*US – Gasoline*).

## SECOND ELEMENT OF THE TEST

- The measure must relate to the conservation of exhaustible natural resources.
  - There must be "a close and genuine relationship of ends and means" between the measure and the conservation objective of the Member maintaining the measure. On its face, the test of "relating to" appears to be more flexible than the test of "necessary" (Appellate Body Reports in *US – Gasoline*, p. 18; *China - Rare Earths*, para. 5.90).
  - A close and genuine relationship of ends and means must be assessed by analyzing the text of the measure (does it establish the goal of conserving an exhaustible natural resource?), as well as its design, architecture and revealing structure, taking into account the key features of the relevant market (Appellate Body Reports in *US – Shrimp*, para. 137; *China – Rare Earths*, paras. 5.95ff; *EC – Seals*, para. 5.302).

# THIRD ELEMENT OF THE TEST

- Restriction must be made effective in conjunction with restrictions on domestic production or consumption:
  - "the trade restrictions must operate jointly with the restrictions on domestic production or consumption ... Such restrictions must place effective limitations on domestic production or consumption and thus operate so as to reinforce and complement the restrictions imposed on international trade ... subparagraph (g) 'is a requirement of even-handedness in the imposition of restrictions'" (Appellate Body Report, *China – Rare Earths*, paras. 5.92-93).
  - In other words, the trade restriction and the restriction on domestic production/consumption must be applied in an even-handed manner, and must work together towards achieving the Member's objective of conserving exhaustible natural resources.

## THE *CHAPEAU* OF ARTICLE XX

- The *chapeau* addresses, not so much the challenged measure or its specific contents as such, but the manner in which that measure is applied (Appellate Body Report, *US-Gasoline*, p. 22).
- To meet the requirements of the *chapeau*, the measure must not be:
  - applied in a manner that arbitrarily or unjustifiably discriminates between countries where the same conditions prevail; and
  - a disguised restriction on international trade.

## THE *CHAPEAU* OF ARTICLE XX

- The Appellate Body has given significant weight to the *chapeau*.
- The *chapeau* is intended to avoid abuse of the exceptions in the sub-paragraphs.
- The *chapeau* is an expression of the principle of good faith, namely the doctrine of the prohibition of abuse of rights.
- This means that Members must exercise their treaty rights *bona fide*, reasonably, in a manner that avoids abusing the rights of other Members under the GATT 1994 (Appellate Body Reports in *US – Gasoline*, p. 22; *US – Shrimp*, para. 158).

## THE *CHAPEAU* OF ARTICLE XX

- In *US – Gasoline*, the Appellate Body clarified: "'Arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction' on international trade may ... be read side-by-side; they impart meaning to one another" (p. 25).
- Appellate Body in *EC – Seal Products*: "the analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the *chapeau* 'should focus on the cause of the discrimination, or the rationale put forward to explain its existence". In other words, the relevant question that must be answered is: "[Can] the discrimination ... be reconciled with, or is [it] rationally related to, the policy objective with respect to which the measure has been provisionally justified[?]" (paras. 5.303, 306).

## THE *CHAPEAU* OF ARTICLE XX

- Another important question that must be addressed under the *chapeau* is "whether the conditions prevailing in different countries are 'relevantly the same'" (Appellate Body Report, *EC – Seal Products*, paras. 5.299-301).
- This question must also be answered by reference to the specific subparagraph of Article XX under which the measure was provisionally justified.