



WTO General Exceptions: Trade Law's Faulty Ivory Tower

Only Two of 48 Attempts to Use the World Trade Organization's GATT Article XX/GATS Article XIV "General Exceptions" Have Ever Succeeded

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Executive Summary

Trade agreements traditionally focused on how goods shipped across borders would be treated including what tariffs rates would apply, what rules would determine the origin of a good and whether there would be quotas on how much could be imported. Some agreements also included rules on the use of trade remedies, such as subsidies rules and antidumping duties. However, with the exception of a few pacts among geographically proximate nations with similar levels of economic development, trade agreements did not cover the service sector, intellectual property rights or competition policy. The establishment of the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA) radically expanded the scope of “trade” agreement rules, newly imposing constraints and obligations on countries regarding an expansive array of domestic regulatory policies. Numerous free trade agreements (FTAs) have since replicated these rules that give primacy to commercial interests and goals over public interest objectives.

As a result, since the NAFTA and Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations that established the WTO, policymakers, scholars and consumer, environmental, health, labor and other civil society organizations around the world have raised alarms about the way in which the “trade” rulebook was being expanded to establish new corporate privileges and limits on government regulatory measures that would undermine public interest policies, including those protecting the environment and public health. Over and over again, negotiators and government trade officials responded with claims that “exceptions” language would safeguard public interest policies that the pacts would otherwise undermine. These “general exceptions” that were initially found in Article XX of the GATT and added to other pacts, they promised, would ensure that signatory-country governments would be able to balance their “trade” obligations with the need to pursue public policy goals.

Yet, in the WTO’s 26 years of existence, there have been only two successful uses (U.S. – Shrimp and U.S. – Tuna-Dolphin) of the general exceptions of the GATT (Article XX) and the General Agreement on Trade in Services (GATS Article XIV) out of 48 attempts to defend domestic policies challenged as illegal under WTO rules.*

The dismal record of the WTO general exceptions that are supposed to preserve countries’ policy space so that “trade” obligations do not impede other societal objectives is, by itself, strong evidence that the system require reform. This report provides a breakdown of the most significant obstacles for respondents that invoke general exceptions and identifies which thresholds have proven the most difficult for respondents to pass. It also describes how the complexities countries face in trying to defend a domestic measure vary depending on the specific defense raised.

The two successful cases both relate to the exception for the conservation of exhaustible natural resources: Attempts to use the other policy objective defenses, such as human health and life and public morals, have been totally shut down. This is largely due to the development of stringent tests and interpretations by the WTO Appellate Body and panels that have created an inflexible framework that is often alien to the realities of domestic policymaking.

The use of GATT Article XX or GATS Article XIV exceptions successfully requires passing three successive steps of legal analysis. All three thresholds must be met for the defense to succeed. The first

* In the European Communities – Asbestos case, the WTO Appellate Body endorsed the panel’s conclusion that the policy was not in breach of any WTO obligation even as it also agreed that the challenged policy complied with the requirements of the general exceptions. To that extent, this analysis does not count this case as an instance of successful invocation of the general exceptions. See further discussion of this case below.

two thresholds relate to the subparagraphs under Article XX or Article XIV that the respondent cites as the basis for the defense, while the third threshold relates to introductory clause or *chapeau* language found in both GATT Article XX and GATS Article XIV.

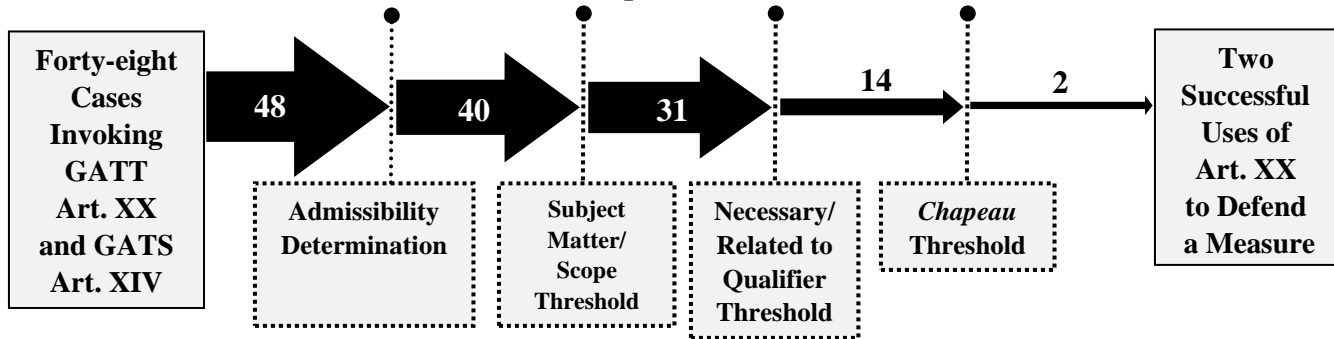
This brief provides a comprehensive assessment of the attempted uses of the exceptions and an analysis about which of the various stringent tests and conditions could not be met in the 46 rejected attempts of the total 48 attempts to defend a measure using the exceptions clauses. Among its most relevant findings are:

- Of the 48 cases, the general exception was determined to be relevant enough to be considered in 40 cases. Thirty-eight of those 40 cases failed to satisfy one of the three threshold tests required for application of the general exception:
 - Nine cases failed on the subject matter/scope threshold, with a tribunal concluding that the respondent failed to show that the measure was designed for the protection of human health or for securing compliance with laws or regulations which were not inconsistent with WTO provisions;
 - Seventeen cases failed on the “necessary” or “related to” threshold; and
 - Twelve cases failed on the *chapeau* threshold, with a tribunal finding arbitrary or unjustifiable discrimination in the measures’ application.
- The defenses that are most often invoked and assessed in the WTO dispute settlement system are subparagraphs (b), (d) and (g) of GATT Article XX. These subparagraphs relate to the following policy objectives: (b) protection of human, animal or plant life or health, (d) the use of measures to ensure compliance with laws or regulations that are not in themselves inconsistent with GATT rules, and (g) conservation of exhaustible natural resources. In addition to these highly litigated defenses, occasionally respondents have also tried to justify their public interest measures by claiming that they are necessary to protect public morals (GATT Art. XX (a) and GATS Art. XIV (a)) or in addition with respect to services, maintain the public order (GATS Art. XIV (a)) or that they are essential to acquire or distribute products in short supply (GATT Art. XX (j)).
- The respondent has lost both the defense and the case in 96% of the instances in which use of the general exceptions has been attempted. This failure rate exceeds even the overall “loss” record of respondents in WTO dispute resolution: The respondent country has lost about 91% of the WTO cases reaching a final ruling in disputes arising from all covered agreements. The impartiality of the legal system of any country in the world would be in question if nine out of ten disputes are won by the complaining party. The fact that the odds are even worse when a responding party tries to defend its policy space by using affirmative defenses only highlights the imbalance of the WTO dispute settlement system.
- The first legal test a respondent must pass when it invokes an exception is the subject matter/scope threshold, which assesses whether the policy measure in question is connected to the issue named in the subparagraph. While GATT Article XX(d) represents 35% of the exceptions raised and analyzed in WTO dispute settlement, it represents 67% of cases lost on the subject matter/scope threshold. Conversely, despite representing more than 40% of the exceptions raised and analyzed, defenses under GATT Articles XX(b) and (g) have failed this threshold in only one case. And, no respondent has ever lost on this threshold when it has invoked the GATT Article XX(a) public morals exception.
- In the general exceptions framework, the relationship between the policy measure in question and the objective or issue named in the subparagraph must meet one or more qualifying criteria. For most cases invoking GATT Article XX and GATS Article XIV, the qualifier threshold requires that the

policy measure be “necessary” for the subparagraph’s named policy objective (e.g., a measure for which GATS Article XIV(a) is invoked must be “necessary to protect public morals or to maintain public order”), or that the policy measure be “relating to” the objective (e.g., measures for which GATT Article XX(g) is invoked must be “relating to the conservation of exhaustible natural resources”). The “necessary” standard has proven much more difficult to fulfill than the “related to” test. While respondents under the “related to” qualifier have a failure rate of 37.5%, the failure rate for the necessity test is 61%.

- Perversely, a greater proportion of cases involving the necessity test passed this threshold before the WTO’s Appellate Body issued a 2007 decision in Brazil – Retreated Tires, which scholars deem to have been defense-friendly. Before the Brazil – Retreated Tires Appellate Body report, 40% of exceptions relying on the necessity analysis passed this test, the success rate declines to 35% after this ruling decision. This underscores the limits that WTO tribunals’ interpretative changes can have with respect to the application of an exception and related legal standards.
- The introductory clause or chapeau of the general exceptions also requires a policy to not be applied in an arbitrary or unjustifiably discriminatory manner between countries where the same conditions prevail or in a way that ends up being a disguised restriction on trade. (This is in addition to demonstrating a certain degree of connectedness to the policy objective specified in each subparagraph.). Respondents that have reached the arbitrary/unjustifiably discriminatory or disguised restriction thresholds have had an extremely low success rate. The reasoning exhibited by the Appellate Body in these cases on the *chapeau* of GATT Article XX and GATS Article XIV show how the WTO adjudicating bodies’ interpretation of the general exceptions and, particularly the *chapeau* language, frequently disregards the domestic constraints and dynamics that typically underpin public interest policies.

Figure 1. The Pathway for the Two Instances of Respondents Successfully Invoking the General Exceptions Defense



Source: Public Citizen’s Global Trade Watch WTO General Exceptions Database, an analysis of the rulings post by the WTO at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

This analysis underscores the urgent need to reform the general exceptions regime of the WTO and should inform the policy discussion about how to do so. The most critical changes relative to the GATT/GATS general exception language that would be necessary to construct effective general exceptions, whether in the context of a broad reform of the WTO Agreements or while negotiating new agreements both within and outside the WTO, are:

- 1. Widening the scope of coverage:** The subject matter of domestic policies that could be implicated by existing and new trade agreements is vast. Additionally, as shown by the wide array of policy

measures that have been discussed under GATT Article XX(d), the subparagraph covering policy objectives related to the compliance with laws and regulations not themselves inconsistent with the GATT, the current scope of GATT Article XX and GATS Article XIV is too narrow. As a priority, subparagraphs (b) and (g) of the GATT, related to the protection of public health and the conservation of exhaustible natural resources respectively, should be amended to include explicit reference to multilateral environmental agreements, and subparagraph (e), which covers measures related to the fight against forced labor, should be expanded to cover more core international labor standards. Additionally, new subparagraphs should be added to give room to policies related to the rights of indigenous people, and human rights in general, culture including by clarifying that countries' obligations under treaties on such matters, as well as on public health including tobacco and toxics controls and labor rights take precedence to the extent of conflict.

2. Limiting panel or Appellate Body discretion with respect to what domestic policies are necessary: WTO jurisprudence on the “necessary” threshold has not been consistent, with rulings ranging from judgments about whether a policy itself is necessary to whether the degree to which it restricts trade is necessary. The best way to limit adjudicating bodies' discretion would be make the “necessary” element of the general exceptions *self-judging*, as has been done in some free trade agreements. Another approach recently used in investment agreements that include general exceptions inspired by GATT Article XX is to replace the “necessity” standard with a “designed and applied to” threshold for all exceptions. A less fulsome alternative would keep part of the necessity test but remove its most problematic element, i.e., the trade restrictiveness analysis.

3. Adjusting the *chapeau* terms to the realities of domestic policymaking: Limiting the discretion of adjudicating bodies to define what is required to meet the *chapeau* tests would also be critical. In this vein, some scholars have proposed a “predominant motive test,” under which public interest measures would be deemed justified under the exceptions as long as their primary objective is one of those permitted by GATT Article XX or GATS Article XIV.

4. Placing the burden of proof on the complaining party with regards to the thresholds established in the *chapeau*: Any general exception with a “specific exception-general requirements” structure should include clear rules of burden of proof where the responsibility to demonstrate that a public interest policy is applied in an arbitrary or unjustifiably discriminatory fashion falls on the country challenging the measure. As articulated in this brief, this approach would be consistent with the core tenets of public international law.

Presumably, it would be easier to implement these proposals in new or even existing FTAs than amend existing WTO Agreements. Indeed, some recent FTAs have altered the general exception boilerplate language that is based on GATT Article XX.

However, this analysis' focus on the uselessness of the current WTO exceptions clauses spotlights a more fundamental problem: The rules of the WTO and many FTAs systematically prioritize commercial interests over the public interest and brand this highly subjective power shift as somehow related to “trade.” Domestic public interest policies, including those that apply equally to domestic and foreign goods, services and firms, that conflict with expansive commercial rules that extend far beyond trade policy become labeled as “trade barriers.” Such policies must be altered or eliminated unless they can meet nearly impossible standards for an exception. This dynamic is why, increasingly, countries and public interest advocates seek to alter the underlying rules or include broad exclusions and carveouts in “trade” deals. This approach rebalances commercial interests and public policy objectives from the outset and establishes a higher standard of proof on a country challenging another's public interest policies.

Of course, the commercial interests that were able to achieve such lopsided rules in the first instance are not keen for a more balanced approach, as that could result in the loss of special protections and privileges. As occurred in the early 1990s during the WTO and NAFTA negotiations, their first claim is that the exceptions in trade pacts protect public interest policies. This analysis provides descriptive data based on the WTO case record to disprove that claim. This report carefully documents the 26-year record that shows the WTO general exceptions are largely useless in their current form. And, consequently, it highlights the urgent need for changes to “trade” rules and exceptions to ensure governments have the policy space needed to address the major challenges of our times.

Introduction

Trade agreements traditionally focused on how goods shipped across borders would be treated including what tariffs rates would apply, what rules would determine the origin of a good and whether there would be quotas on how much could be imported. Some agreements also included rules on the use of trade remedies, such as subsidies rules and antidumping duties. However, with the exception of a few pacts among geographically proximate nations with similar levels of economic development, trade agreements did not cover the service sector, intellectual property rights or competition policy. The establishment of the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA) radically expanded the scope of “trade” agreement rules, newly imposing constraints and obligations on countries regarding an expansive array of domestic regulatory policies. Numerous free trade agreements (FTAs) have since replicated these rules that give primacy to commercial interests and goals over public interest objectives.

As a result, since the NAFTA and Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations that established the WTO, policymakers, scholars and consumer, environmental, health, labor and other civil society organizations around the world have raised alarms about the way in which the “trade” rulebook was being expanded to establish new corporate privileges and limits on government regulatory measures that would undermine public interest policies, including those protecting the environment and public health. Over and over again, negotiators and government trade officials responded with claims that “exceptions” language would safeguard public interest policies that the pacts would otherwise undermine. These “general exceptions” that were initially found in Article XX of the GATT and added to other pacts, they promised, would ensure that signatory-country governments would be able to balance their “trade” obligations with the need to pursue public policy goals.

Yet, in the WTO’s 26 years of existence, there have been only two successful uses of the general exceptions of the GATT and the General Agreement on Trade in Services (GATS) out of 48 attempts to defend domestic policies challenged as illegal under WTO rules.

Moreover, the two successful cases both relate to the exception for the conservation of exhaustible natural resources: Attempts to use the other policy objectives defenses, such as human health and life and public morals, have been totally shut down. This is largely due to the development of stringent tests and interpretations by the WTO Appellate Body and panels that have created an inflexible framework that is often alien to the realities of domestic policymaking.

The uselessness of the WTO general exceptions to protect domestic policy space is increasingly problematic considering the significant changes in international economic governance priorities and pressures for reform seen in recent years. Until the Global Financial Crisis (2007-08), most trade and financial officials viewed their mission as constraining government involvement in markets by promoting deregulation and maximizing unrestricted cross-border flows of goods, services and capital to achieve ever-diminishing efficiency gains. Underpinned by the launch of the WTO in 1995, “free trade” enthusiasts spent decades advocating for the expansion of “trade” rules with a markedly corporate-led agenda that aimed at expanding the reach of WTO undertakings into policy domains, even beyond Uruguay non-trade topics such as detailed food and product standards and intellectual property, but now into investment, competition and government procurement rules.

However, the economic turmoil caused by the collapse of the international financial markets, along with the growing recognition of corporate-led hyperglobalization’s failure to fulfill its boosters’ promises of widespread prosperity and, indeed, its contribution to increased inequality between and within nations and

the deterioration of the environment have generated pressure for alternative approaches to international economic statecraft.¹

This new thinking situates trade policy as a tool to achieve societal objectives such as reduction of carbon emissions, rebuilding resilience and industrial bases in advanced economies and combating human rights violations and unfair labor practices. This contrasts with the pursuit of greater volumes of trade for its own sake or a singular focus on “efficiency.”

The European Carbon Border Adjustment Mechanism (CBAM), for instance, will use a carbon tariff applied to imported products in specific sectors to level the playing field with EU products that are covered by the union’s Emissions Trading System (ETS) with a goal of incentivizing other countries to ramp up their climate ambitions. EU officials have stated that the mechanism will comply with EU WTO commitments, a position that is premised on the application of the GATT general exceptions contained in Article XX. Yet, several commentators, including a former WTO Appellate Body member, have argued that it is likely that the CBAM would fail to meet the multiple conditions that must be satisfied to use the GATT Article XX defense, not the least of which being that the policy would not be “necessary” to meet the EU’s climate objectives or would be deemed to be “arbitrary or unjustifiably discriminatory” or a “disguised restriction on international trade.”² Similarly, banning imports made by forced labor or from specific facilities that violate the core International Labor Organization workers’ right to organize are entirely legitimate policies. Yet it is unclear how the current WTO exceptions would relate to these measures.

The fact that these new policies and mechanisms could be undermined by the WTO dispute settlement system (DSS) because the system does not give enough policy space to member countries wishing to further pro-environment or pro-worker measures is deeply worrisome. And, efforts to impose a corporate-rigged non-trade agenda through “trade” deals that undermine policies and institutions underpinning a resilient, equitable and secure economy have not disappeared. For instance, some countries, leveraged by Big Tech firms, are engaged in what is called the “Joint Statement Initiative on E-Commerce” (JSI-Ecomm). Despite a lack of authorization for such talks under WTO procedures,³ some countries are trying to use the established WTO legal framework to formalize new WTO e-commerce or so-called “digital trade” rules. This latest attempt to expand the multilateral “trade” rulebook to establish new corporate privileges that undermine consumer, labor, and environmental policies is very concerning. Big Tech interests have permeated these negotiations and are pushing terms that would threaten anti-trust regulation, consumer and worker rights and privacy protections by labelling such measures as “barriers to digital trade.” In response to concerns, particularly by developing countries, supporters of these initiatives have quickly pointed out that any eventual agreement could include “exceptions,” such as those incorporated in Article XIV of the GATS. Proponents argue that such exceptions can serve as an important balancing tool and preserve states’ decision-making space.⁴ Indeed, the most recently known JSI-Ecomm text has

¹ Dani Rodrik, 2018, *Straight Talk on Trade, Ideas for a Sane World Economy*. Princeton University Press. Princeton.

² James Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism*. Cato Briefing Paper 125. 2021. Washington: Cato Institute. Available at <https://www.cato.org/sites/cato.org/files/2021-08/briefing-paper-125.pdf>.

³ Jane Kelsey, *Why the Joint Statement Initiatives Lack Legal Legitimacy in the WTO: A Response to Hamid Mamdouh, 'Plurilateral Negotiations and Outcomes in the WTO'*, June 22, 2021. Available at: https://ourworldisnotforsale.net/2021/Kelsey_JSI_legitimacy.pdf

⁴ Arindrajit Basu, *Can the WTO build consensus on digital trade?*, October 5, 2021. Available at: <https://www.hinrichfoundation.com/research/article/wto/can-the-wto-build-consensus-on-digital-trade/>

general exceptions proposals that are largely modeled after GATT Article XX and GATS Article XIV, including specific exceptions to data provisions that are also based on the GATT Article XX boilerplate language.⁵ However, WTO panels and the WTO Appellate Body have rarely approved of the use of those exceptions, and instead have sided with the country lodging a challenge of public interest regulations adopted by another member. Indeed, this brief provides a comprehensive assessment of the attempted uses of the exceptions and an analysis about which of the various stringent tests and conditions could not be met in the 46 rejected attempts of the total 48 attempts to defend a measure using the exceptions clauses.

The bottom line is that the provisions that are supposed to give safe harbor to policies that promote sustainability, like the CBAM, or those that countries might need to impose in the future to rein in the giants of the digital economy, in fact, do not provide effective safeguards for domestic policies. If the multilateral trading system is to remain viable, its existing architecture requires a major overhaul. And, any new agreements must include language that actually preserves the policy space needed to adopt measures directed to address the major challenges of our time.

The WTO General Exceptions Structure Forces Respondents to Pass Several Legal Tests

The use of GATT Article XX or GATS Article XIV exceptions as a successful defense for a domestic policy that is found to violate a WTO rule requires passing three successive steps of legal analysis. All three thresholds must be met for the defense to succeed. The first two thresholds relate to the subparagraphs under Article XX or Article XIV that the respondent cites as the basis for the defense, while the third threshold relates to the identical *chapeau* language found in GATT Article XX and GATS Article XIV. WTO panels and the Appellate Body typically consider each threshold in the order listed below, proceeding to the next threshold only if the one under consideration withstands their evaluation. The three thresholds are:

- 1. Subject Matter/Scope:** The policy measure in question must be connected to the issue named in the subparagraph. Some of the issues or public policy areas included in GATT Article XX subparagraphs are public morals, human health, conservation of exhaustible natural resources and prison labor. Concerning services, GATS Article XIV contemplates a couple of different policy objectives, such as maintaining public order, in addition to public morals and human health. It omits, among other policy areas, any mention to natural resources or historical, cultural or artistic treasures. WTO panels and the Appellate Body have typically required that the measure in question be “designed to” fulfill the public policy objective (e.g., for a GATT Article XX(b) defense, the policy must be designed for the protection of human, animal or plant life or health).
- 2. Qualifier – “Necessary,” “Related to”:** The relationship between the policy measure in question and the objective or issue named in the subparagraph must meet one or more qualifying criteria. For most cases invoking GATT Article XX and GATS Article XIV, the qualifier threshold requires that the policy measure be “necessary” for the subparagraph’s named policy objective (e.g., a measure for which GATS Article XIV(a) is invoked must be “necessary to protect public morals or to maintain

⁵ The inclusion of both specific exceptions for certain provisions and general exceptions in any eventual “digital trade” WTO agreement would pose serious interpretative issues and uncertainty, particularly, if the general and the specific exceptions have grammatical and structural differences. See: WTO Electronic Commerce Negotiations (Updated Consolidated Negotiating Text – September 2021). P. 86 and 27-29. Available at: https://www.bilaterals.org/IMG/pdf/wto_plurilateral_ecommerce_draft_consolidated_text_september_2021.pdf.

public order”), or that the policy measure be “relating to” the objective (e.g., measures for which GATT Article XX(g) is invoked must be “relating to the conservation of exhaustible natural resources”).

In most cases, satisfying the qualifier threshold requires passing multiple subtests. For example, for a policy to be deemed “necessary,” a panel or the Appellate Body requires *all* of the following conditions to be satisfied:

- a. The objective of the policy must be legitimate.
- b. The policy measure must contribute to the achievement of the legitimate objective (in the view of the panel or Appellate Body).
- c. The policy measure must not be more trade-restrictive than necessary to accomplish the legitimate objective. For many years, what precisely was required to meet this prong of the test was a moving target, with decisions in some cases effectively requiring the country seeking to defend a law to meet the impossible mission of proving the negative – that a less trade-restrictive option did not exist. However, eventually the Appellate Body placed the burden of proof on the country challenging another country’s policy to bring forward evidence of less trade-restrictive measures that could achieve the same level of meeting the named goal as the challenged policy.

3. *Chapeau*: Articles XX and XIV *chapeaux* contain three additional subtests for the policy measure, each of which must be passed for the *chapeau* threshold to be met. These are:

- a. The measure is “not applied in a manner which would constitute a means of arbitrary... discrimination between countries where the same conditions prevail...”
- b. The measure is “not applied in a manner which would constitute a means of...unjustifiable discrimination between countries where the same conditions prevail...”
- c. The measure is “not applied in a manner which would constitute...a disguised restriction on international trade.”

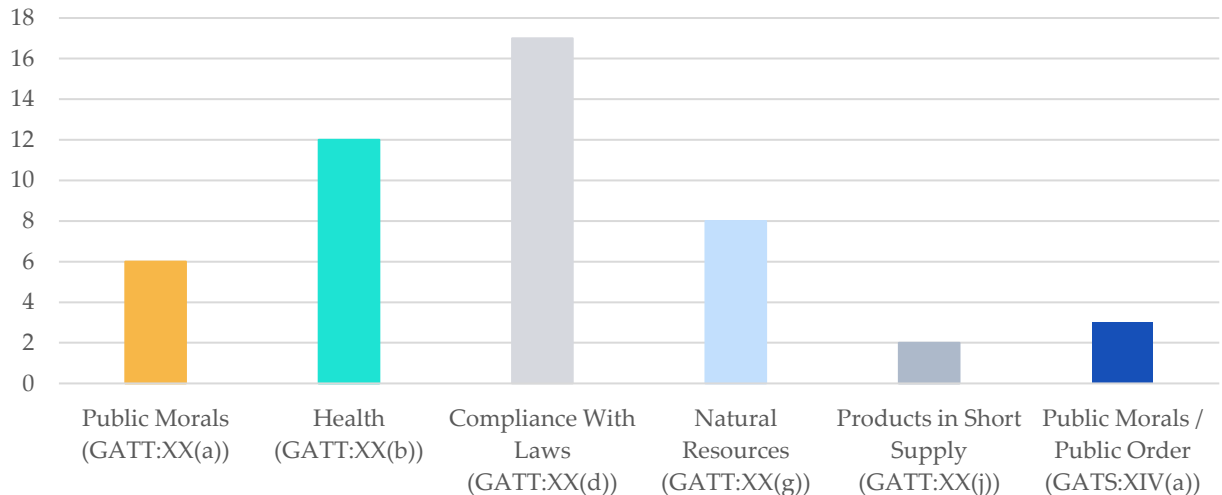
The Dismal Record of GATT Article XX and GATS Article XIV Exceptions: 96% Failure

WTO panels and the Appellate Body have analyzed GATT Article XX and GATS Article XIV defenses 48 times.⁶ The defenses that are most often invoked and assessed in the WTO DSS are subparagraphs (d), (b) and (g) of GATT Article XX. These subparagraphs relate to the following policy objectives: (d) compliance with laws or regulations which are not themselves inconsistent with the provisions of the GATT, (b) protection of human, animal or plant life or health, and (g) conservation of exhaustible natural resources. In addition to these highly litigated defenses, occasionally respondents have also tried to justify their public interest measures by claiming that they are necessary to protect public morals and, in the case of services, maintain the public order (GATT Art. XX (a) and GATS Art. XIV (a)) or that they are essential to acquire or distribute products in short supply (GATT Art. XX (j)).

⁶ This analysis counts the times in which an exception has been invoked to justify one or more measures, provided that the final adjudicating body deemed that the measures were inconsistent with a WTO obligation, at least. When different requests for the establishment of a panel coming from more than one claimant were consolidated in a single proceeding, we consider them as a single case. In cases where the respondent has raised more than one exception and the Appellate Body and the panels have exercised judicial economy over the one or more exceptions, we exclude from the analysis the exceptions that were not thoroughly analyzed.

The graph below provides a breakdown of the defenses raised and analyzed in the DSS by relevant subparagraph:

Number of General Exceptions Analyzed by WTO Adjudicating Body Divided by Relevant Subparagraph (1995-2021)



Source: Public Citizen's Global Trade Watch WTO General Exceptions Database, an analysis of the rulings post by the WTO at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Regardless of which particular subparagraph of the general exception is raised, in the overwhelming majority of cases the defenses have not been successful. The respondent has lost both the defense and the case in 96% of the instances in which use of the general exceptions has been attempted.⁷ This failure rate exceeds even the overall “loss” record of respondents in WTO dispute resolution: The respondent country has lost about 91% of the WTO cases reaching a final ruling in disputes arising from all covered agreements.⁸ The impartiality of the legal system of any country in the world would be in question if nine out of 10 disputes were won by the complaining party. The fact that the odds are even worse when a responding party tries to defend its policy space by using affirmative defenses only highlights the imbalance of the WTO dispute settlement system.

The dismal record of the WTO general exceptions that are supposed to preserve countries' policy space so that “trade” obligations do not impede other societal objectives is, by itself, a clear proof of the need to reform the system. **This brief provides a breakdown of the most significant obstacles for respondents that invoke general exceptions and identifies which thresholds have proven the most difficult for respondents to pass. It also describes how the complexities countries face in trying to defend a domestic measure vary depending on the specific defense raised.** The analysis underscores the urgent

⁷ This analysis does not include pre-WTO GATT cases in which Article XX was raised, in part because under GATT rules, the rulings on some of these cases were never finally adopted, which created a methodological question of which GATT cases to count in an assessment of official “jurisprudence” on the provision.

⁸ Public Citizen's Global Trade Watch, *Fatally Flawed WTO Dispute System*, November 15, 2019. Available at: <https://mkus3lurbh3lbtg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/WTO-Disputes-Summary-November-2019-FINAL.pdf>

need to reform the general exceptions regime of the WTO and should inform the policy discussion about how to do it.

The Invisible Threshold: WTO Exceptions Admissibility Analysis

Prior to engaging in the assessment of the three successive steps of legal analysis identified above, WTO adjudicative bodies have dismissed outright the use of affirmative defenses by respondents in a not-insignificant number of cases. This step could be called the admissibility threshold. Virtually no international trade law textbook or journal article ever mentions it.

Of the 48 cases in which the exceptions were analyzed, a WTO panel or the Appellate Body decided to consider the exception in 40 instances, determining the exceptions to be irrelevant or inadmissible in the remaining eight cases.⁹ Most of these cases are related to policies that fall within the scope of either the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement") or the WTO's Technical Barriers to Trade (TBT) Agreement. Both were launched as part of the Uruguay Round negotiations that also established the WTO and evolved from the Tokyo Round's Standards Code.

The SPS and TBT Agreements included a new set of obligations that go beyond the commitments undertaken by the GATT signatory countries in 1947. Whereas the backbone of the GATT was trade liberalization, which was to be achieved by binding tariffs, removing quantitative restrictions and non-discrimination, the SPS and TBT agreements imposed new obligations on governments. In the case of the SPS Agreement, measures adopted to protect human, animal or plant life and health against pests or diseases or those to protect humans and animals from contaminated food, beverages or feedstuffs, i.e., SPS measures, must comply with new, allegedly "science-related" requirements. In the case of technical regulations and standards, governed by the

French Asbestos Ban: One of Few Challenged Policies Ruled Not to Violate WTO Terms, But the General Exceptions Were Not the Basis

In 1997, the French government banned the manufacturing, sale, import or export of asbestos due to its proven carcinogenic effects. Canada filed a WTO complaint against this policy, claiming that it violated GATT's national treatment provision, among other WTO obligations.

While the WTO Appellate Body eventually endorsed the panel's conclusion that the ban was justified as a measure to protect human health under GATT Article XX(b), the basis of its ruling was that asbestos was not a "like product" compared to domestic alternative fibers. Consequently, the ban did not breach the national treatment obligation and thus France did not need to rely on the general exception. This ruling departed from the established WTO jurisprudence on likeness. Some have argued that this decision can be seen as a self-preservation move, given the significant backlash the WTO experienced after the U.S. – Shrimp ruling (discussed below), which implicated endangered sea turtles.

In any case, since the exceptions defense was not the reason why the WTO Appellate Body ultimately concluded that the asbestos ban was not a WTO violation, this analysis does not count this case as an instance of successful invocation of the general exceptions.

⁹ These are DS26/48 European Communities — Measures Concerning Meat and Meat Products (Hormones); DS291/292/293 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS371 Customs and Fiscal Measures on Cigarettes from the Philippines (First Recourse to DSU Art. 21.5); DS371 Customs and Fiscal Measures on Cigarettes from the Philippines (Second Recourse to DSU Art. 21.5); DS392 United States — Certain Measures Affecting Imports of Poultry from China; DS406 United States — Measures Affecting the Production and Sale of Clove Cigarettes; DS 431/432/433 China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum with respect to subparagraph (b) of GATT Art. XX; and DS447 United States — Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina.

TBT Agreement, measures must be “not more trade-restrictive than necessary” and conform with international standards to be deemed WTO-legal. Yet, both agreements also contain non-discrimination obligations and, to that extent, overlap with GATT Articles I and III.

During the WTO's first years in existence, countries that faced challenges to their domestic policies based on the SPS or TBT Agreements and the GATT tried to use the general exceptions as a defense. In one of the first cases that went through the WTO dispute settlement system, the European Communities (EC) – Hormones case, the EC claimed that in order to analyze potential breaches of the substantive provisions of the SPS Agreement, the panel had to go through the obligations and exceptions of the GATT first.¹⁰ However, the panel in that case rejected this argument, and it has become common practice for WTO panels to choose to analyze only the SPS or TBT claims and then exercise “judicial economy” over GATT claims, if they find SPS or TBT violations.

For instance, in the U.S. – Clove Cigarettes case, Indonesia challenged a provision in the U.S. Family Smoking Prevention Tobacco Control Act of 2009 that banned sweet-flavored cigarettes. Indonesia alleged, in part, a violation of the GATT and also violations of the TBT Agreement. The United States invoked Article XX(b), arguing that the ban “was enacted in order to protect human life and health from the risk posed by smoking and was necessary to ensure that products that are predominantly used as ‘starter’ products by youth, leading to years of addiction, health problems, and possibly death, cannot be sold in the United States.”¹¹ In a September 2011 report, the WTO panel decided that, having found the U.S. policy violated the WTO's TBT Agreement, it would not consider Indonesia's claim of a GATT violation nor the U.S. GATT Article XX defense.¹² The Appellate Body merely noted the panel's decision with respect to not examining the GATT claims, granting it no further consideration.¹³ The consequence of this practice is that countries are left unable to use affirmative defenses when a technical regulation or a SPS measure is challenged through the WTO. This has created an imbalance that favors complainants in dispute settlement proceedings.

The Subject Matter/Scope Threshold:

A Disproportionately High Hoop for GATT Art. XX(d)

Of the 40 cases where the general exception was deemed relevant, in nine cases countries' efforts to defend their policies explicitly failed at the subject matter/scope threshold.¹⁴ However, WTO adjudicators also

¹⁰ Panel Report, European Communities — Measures Concerning Meat and Meat Products (Hormones), WT/DS26/R/USA, 18 August 1997, para. 8.33.

¹¹ Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R, 2 September 2011, at para. 7.297.

¹² Panel Report, US – Clove Cigarettes, at para. 7.307.

¹³ Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, 4 April 2012, at para. 3.

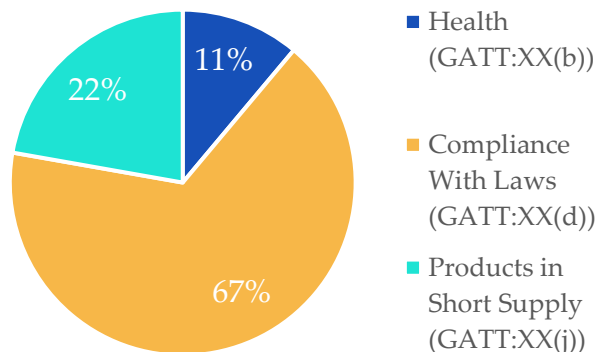
¹⁴ These are DS31 Canada - Certain Measures Concerning Periodicals, DS174/290 European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, DS246 European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries, DS308 Mexico – Tax Measures on Soft Drinks and Other Beverages, DS339/340/342 China – Measures Affecting Imports of Automobile Parts, DS371 Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, DS456 India – Certain Measures Relating to Solar Cells and Solar Modules with respect to both subparagraphs (d) and (j) of GATT Art. XX (Since the WTO adjudicating bodies analyzed each exception separately, each exception raised is counted individually), DS476 European Union – Certain Measures Relating to the Energy Sector. In the EC – Tariff Preferences case, India challenged as a GATT violation a system of tariff preferences employed by the European Communities to combat drug trafficking. The European Communities invoked Article XX(b), arguing “it is beyond dispute that narcotic drugs pose a risk to human life and health in the European Communities and that tariff preferences contribute to the protection of human life and health by supporting the measures taken by other countries against the illicit production and trafficking of those substances, thereby reducing their supply to the

did not clearly conclude that this requirement was met in all of the 31 remaining cases. For instance, in Indonesia – Import Licensing Regimes, the Indonesian government tried to justify 18 challenged measures under subparagraphs (a), (b) and (d) of GATT Article XX. The panel endeavored to analyze each measure under each of the exceptions invoked. In doing so, it determined that some of the defenses could not be evaluated because of due process concerns related to Indonesia raising the defense late in the proceedings or lack of argumentation. Other defenses were dismissed under the subject matter/scope threshold. However, for most the panel did not rule whether the exceptions invoked by Indonesia passed or failed the subject matter/scope threshold. Despite the well-established order of analysis set by Appellate Body jurisprudence, the panel in this case skipped the first two steps

and decided first if the challenged measures would pass the requirements of the general exception *chapeau*. Then, having found that the measures did not comply with these conditions, it abstained from analyzing the subject matter/scope and necessity thresholds.¹⁵ The Appellate Body did not endorse this methodology, but also refrained from correcting the legal error because, on its appeal, Indonesia did not request the Appellate Body to complete the analysis because the record did not have sufficient evidence to complete the assessment.¹⁶ This lack of consistency, in addition to introducing legal uncertainty to the dispute settlement system, poses a methodological issue for this analysis since it assumes that adjudicating bodies will follow the legal structure of the exceptions, as interpreted by the Appellate Body since the inception of the WTO. However, for simplicity, we will assume that the three exceptions raised by Indonesia in the discussed case passed both the subject matter/scope and necessity thresholds.

A significant majority of cases for which application of the exception was denied on the subject matter/scope threshold involved GATT Article XX(d), the exception for measures that are necessary to secure compliance with laws or regulations themselves not inconsistent with the GATT. In six of the 17 instances when this defense has been considered, WTO adjudicating bodies have decided that the challenged measures were not “designed to” address the relevant public policy objective under the specific

Percentage of General Exceptions that Failed Subject the Matter/Scope Threshold by Relevant Subparagraph



Source: Public Citizen's Global Trade Watch WTO General Exceptions Database, an analysis of the rulings post by the WTO at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

European Communities.” In a December 2003 report, a WTO panel decided that the E.C. counter-narcotic tariff preference system “is not one designed for the purpose of protecting human life or health in the European Communities and, therefore...not a measure for the purpose of protecting human life or health under Article XX(b) of GATT 1994.” The Appellate Body noted the panel’s decision, granting it no further consideration. Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, 7 April 2004, at para. 6. In Thailand — Cigarettes (Philippines), Thailand actually lost the defense on all thresholds simultaneously, including the subject matter/scope threshold. The Appellate Body rejected the entirety of Thailand’s defense in three paragraphs, arguing that the government had “failed to make out a prima facie defence.” Appellate Body Report, Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, WT/DS371/AB/R, 17 June 2011, at para. 180.

¹⁵ Panel Report, Indonesia – Importation of Horticultural Products, Animals and Animal Products, WT/DS477/AB/R-WT/DS478/AB/R, 22 December 2016, at para. 7.829.

¹⁶ Appellate Body Report, Indonesia – Importation of Horticultural Products, Animals and Animal Products, WT/DS477/AB/R-WT/DS478/AB/R, 9 November 2017, at paras. 5.101 – 5.103.

subparagraph. Moreover, while GATT Article XX(d) represents 35% of the exceptions raised and analyzed in the DSS, it represents 67% of cases lost on the subject matter/scope threshold. Conversely, despite representing more than 40% of the exceptions raised and analyzed, defenses under GATT Articles XX(b) and (g) have failed this threshold in only one case. And, no respondent has ever lost on this threshold when it has invoked GATT Article XX(a)'s public morals exception.

The inflexibility of WTO adjudicating bodies concerning defenses based on the need to secure compliance with other bodies of law is particularly problematic when other international obligations are in play, especially those related to the preservation of the environment. In *India – Solar Cells*, the United States challenged the domestic content requirements (DCRs) imposed by the Indian government to entities selling electricity under the National Solar Mission. Basically, certain solar cells and modules used by the solar power developers that entered into long-term power purchase agreements with the government had to be manufactured in India. India attempted to justify the DCRs by pointing out that these measures would “ensure ecologically sustainable growth while addressing India’s energy security challenge, and ensuring compliance with its obligations relating to climate change,” as required by several domestic policies and international instruments.¹⁷ The UN Framework Convention on Climate Change, the Rio Declaration on Environment and Development (1992), and the UN Resolution A/RES/66/288 (2012) (Rio+20 Document: “The Future We Want”) were among the international instruments raised by India to justify its actions. However, both the panel and the Appellate Body, instead of analyzing whether the DCRs actually were designed to contribute to the fulfillment of India’s climate change obligations under the aforementioned documents, decided that the international instruments identified by India do not fall within the scope of “laws and regulations” under GATT Article XX (d). The WTO adjudicating bodies used a narrow definition of “laws and regulations” that limits the kind of rules and principles that could justify measures under subparagraph (d) to those that explicitly form part of the respondent party’s domestic legal system.¹⁸

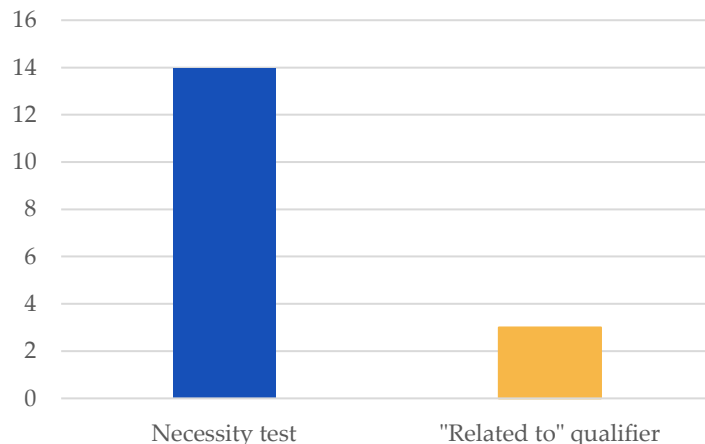
The Appellate Body’s rationale underscores not only the troubling conflicts generated by the fragmentation of international law,¹⁹ but also that the established general exceptions in trade instruments provide no remedy, especially when WTO adjudicating institutions refuse to take into consideration the obligations arising from other bodies of international law relating to environmental, human rights, or other matters. This situation is particularly problematic when it comes to climate change and recent efforts by countries around the world to ensure a just transition to a greener economy. If government measures to guarantee a just economic transition are deemed to be indefensible WTO violations, countries might choose not to act at all, a regulatory chill that the world cannot afford given the climate crisis. Among other reforms, the WTO DSS must rebalance the weight given to other international law regimes and global challenges.

¹⁷ Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R, 16 September 2016, at para. 5.94.

¹⁸ Appellate Body Report, *India – Solar Cells*, at para. 5.140.

¹⁹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, April 13, 2006. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

Number of Cases Where the Respondent Failed the Qualifier Threshold



Source: Public Citizen's Global Trade Watch WTO General Exceptions Database, an analysis of the rulings post by the WTO at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

The Qualifier Threshold and its Strict Necessity Test

Of the 31 cases that passed the subject matter/scope step, 17 failed the qualifier (“necessary” or “related to”) threshold.²⁰ The “necessary” standard has proven much more difficult to fulfill than the “related to” test. While respondents under the “related to” qualifier have a failure rate of 37.5%, the failure rate for the necessity test is 61%. The conspicuous difficulties that respondents have faced when trying to defend their measures under subparagraphs with the “necessary” qualifier warrants a closer look at the WTO case law on this subject.

During the WTO's 26 years in effect, the Appellate Body has modified the interpretation of “necessary.” In 2000, the Appellate Body issued a report on the Korea – Beef case, in which Australia and the United States challenged South Korea's dual

retail system for the sale of beef. (Korea required retailers to sell either Korean or foreign beef, but not both. Or, in the cases of large stores, retailers were required to clearly indicate the origin of the product by having separate, labeled locations.) South Korea asserted that the system was necessary to secure compliance with its Unfair Competition Act, which among other objectives, intends to prevent deceptive practices.

This was the first case in which the Appellate Body discussed at length the requirements of the necessity test. In doing so, it established a high bar for a measure to be considered “necessary,” as it required the challenged policy to be almost indispensable for the fulfilment of the policy objective invoked by the respondent. In the words of the Appellate Body: “As used in Article XX(d), the term ‘necessary’ refers,

²⁰ These are DS161/169 Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef; DS276 Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain; DS302 Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes; DS343 United States — Measures Relating to Shrimp from Thailand/DS345 United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (the last two cases are treated as one dispute since the complaints raised by Thailand and India dealt with virtually the same measure, the cases were decided by the same panel and, on appeal, the Appellate Body issued a single report); DS363 China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products; DS366 Colombia — Indicative Prices and Restrictions on Ports of Entry; DS394/395/398 China — Measures Related to the Exportation of Various Raw Materials with respect to both subparagraphs (b) and (g) of GATT Art. XX; DS431/432/433 China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum with respect to subparagraph (g) of GATT Art. XX; DS461 Colombia - Measures Relating to the Importation of Textiles, Apparel and Footwear with respect to both subparagraphs (a) and (d) of GATT Art. XX; DS472/497 Brazil – Certain Measures Concerning Taxation and Charges with respect to subparagraphs (a), (b) and (g) of GATT Art. XX; DS484 Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products with respect to both subparagraphs (b) and (d) of GATT Art. XX; and DS543 United States – Tariff Measures on Certain Goods from China. In the cases where more than one specific subparagraph of GATT Article XX is mentioned, the WTO adjudicating bodies analyzed the merit of each exception separately. Therefore, for the purposes of this study, each subparagraph is counted as an individual exception raised by a respondent.

in our view, to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to.' We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.²¹

In addition, this was the case in which the Appellate Body introduced the notion of weighing and balancing the importance of the common interests or values that the measure intends to protect, the degree of the measure's contribution to the achievement of the end pursued and its trade restrictiveness.²² Some legal scholars have argued that the creation of this legal construct has tipped the balance against challenged policies, especially since the WTO adjudicating bodies tend to judge the value of the policy goal using their own value system and exhibit opaque reasoning on how the elements of the balancing test interact when applied to the particular circumstances of a case.²³

The Appellate Body moved, theoretically, to a more defense-friendly interpretation in Brazil – Retreaded Tires. In this case, the European Communities challenged Brazil's policy measures banning the importation of retreaded tires. Brazil invoked Article XX(b), arguing that the import ban "is a measure necessary to protect human life and health and the environment" because it "avoids the unnecessary generation of additional tire waste, and its accumulation and disposal, which presents well-recognized dangers to public health and the environment."²⁴ These include "cancer, dengue, reproductive problems, environmental contamination, and other associated risks."²⁵ In a June 2007 report, a WTO panel found that the tire import ban was necessary for the protection of "human, animal or plant life or health,"²⁶ and then proceeded to assess the measure under the requirements of the *chapeau*. The Appellate Body endorsed the panel's conclusion regarding necessity and even went a step further by changing the understanding of the "contribution" prong of the necessity analysis. In its report, the Appellate Body stated: "Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. **To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material**, not merely marginal or insignificant, especially if the measure at issue is as trade-restrictive as an import ban" (emphasis added).²⁷

Most scholars saw this decision as a major departure from the reasoning articulated in Korea – Beef and concluded that the "genuine means-ends relationship" was a lower standard for respondents to meet relative to the notion of "close-to-indispensable" of Korea – Beef.²⁸ However, rather counterintuitively, a greater proportion of cases involving the necessity test passed this threshold before the Appellate Body report in Brazil – Retreaded Tires than after this landmark case. Indeed, while before the Brazil – Retreaded

²¹ Appellate Body Report, DS161/169 Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R-WT/DS169/AB/R, 11 December 2000, at para. 161.

²² Appellate Body Report, Korea - Beef, at paras. 162 – 164.

²³ Gisele Kapterian. "A Critique of the WTO Jurisprudence on 'Necessity.'" *The International and Comparative Law Quarterly*, Vol. 59, No. 1, January 2010, p. 89. Available at: <https://www.jstor.org/stable/25622271>

²⁴ Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, 12 June 2007, at para. 4.9.

²⁵ Panel Report, Brazil – Retreaded Tyres, at para. 4.11.

²⁶ Panel Report, Brazil – Retreaded Tyres, at para. 7.215.

²⁷ Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 3 December 2007, at para. 210.

²⁸ Chad P. Bown and Joel P. Trachtman. "Brazil – Measures Affecting Imports of Retreaded Tyres : A Balancing Act." *World Trade Review* (2009), 8: 1, 85–135. P. 126; Gisele Kapterian. "A Critique of the WTO Jurisprudence on 'Necessity.'" *The International and Comparative Law Quarterly*, Vol. 59, No. 1, January 2010, p. 124. Available at: <https://www.jstor.org/stable/25622271>

Tires Appellate Body report 40% of exceptions relying on the necessity analysis passed the test, this success rate declines to 35% after the 2007 decision. Tellingly, every case that failed the necessity test after Brazil – Retreated Tires did so because WTO adjudicating bodies questioned to what degree the challenged measures would contribute to the fulfilment of the stated objective. This fact indicates the limitations of the interpretative changes of legal standards and questions whether they have a real impact in the outcomes of the cases being litigated, particularly in relation to the actual degree of deference conferred to countries' regulatory autonomy through the necessity test.

Table 1. Rulings on the Necessity Test Before and After Brazil – Retreated Tires

<i>Before Brazil – Retreated Tires</i>		<i>After Brazil – Retreated Tires</i>	
Passed Necessity Test	Failed Necessity Test	Passed Necessity Test	Failed Necessity Test
Argentina – Hides and Leather	Korea – Beef	US – Gambling (Art. 21.5 DSU)	US – Shrimp (Thailand)/ Customs Bond Directive
US – Gambling	Canada – Wheat Exports and Grain Imports	EC – Seals	China – Audiovisuals
	Dominican Republic – Import and Sale of Cigarettes	EU – Energy Package	Colombia – Ports of Entry
		Indonesia – Import Licensing Regimes (GATT Art. XX(a))	China – Raw Materials
		Indonesia – Import Licensing Regimes (GATT Art. XX(b))	Colombia – Textiles (GATT Art. XX(a))
		Indonesia – Import Licensing Regimes (GATT Art. XX(d))	Colombia – Textiles (GATT Art. XX(d))
			Brazil – Taxation (GATT Art. XX(a))
			Brazil – Taxation (GATT Art. XX(b))
			Indonesia – Chicken (GATT Art. XX(b))
			Indonesia – Chicken (GATT Art. XX(d))
			US – Tariff Measures

Source: Public Citizen's Global Trade Watch WTO General Exceptions Database, an analysis of the rulings post by the WTO at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

Even though both the panel and the Appellate Body deemed that the import ban put in place by Brazil was necessary to protect human health, the measure ultimately was still struck down because it failed to meet the final test, compliance with the requirements of GATT Article XX *chapeau*. This outcome is not unique to this case: As discussed below, the *chapeau* represents the largest pitfall for respondents trying to justify their domestic measures under the general exceptions of the GATT and the GATS.

The Chapeau General Exception Requirements: The Biggest Pitfall for Respondents

Of the 14 cases that passed the stringent analysis of the WTO adjudicating bodies under the subparagraphs of GATT Art. XX and GATS Art. XIV, 12 failed the *chapeau* threshold.²⁹

In the aforementioned case Brazil – Retreaded Tyres, the panel decided that since Brazil also imports used tires for domestic retreading, the import ban failed the *chapeau* threshold as “unjustifiable discrimination and a disguised restriction to trade.”³⁰ The Appellate Body upheld the panel’s finding of a *chapeau* violation, though for different reasons, concluding that the ban “constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”³¹ In coming to this conclusion, the Appellate Body focused on an exception to Brazil’s ban for countries party to the MERCOSUR South American trade bloc, an exception which was introduced as a consequence of a ruling by a MERCOSUR tribunal that found that Brazil’s restriction on imports of remolded tires was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. Brazil’s attempt to remedy a health problem while meeting its MERCOSUR obligations was deemed by the Appellate Body to comprise unjustified discrimination: “In our view, 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), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.”³²

Similarly, the WTO Appellate Body’s only ruling on the *chapeau* of GATS Article XIV,³³ which parallels GATT Article XX, was against the defending country, the United States. In U.S. – Gambling, the United States lost both the GATS Article XIV defense and the case to Antigua and Barbuda’s claim that several U.S. laws that functioned to ban internet gambling violated U.S. GATS commitments by inhibiting the cross-border supply of gambling services. The United States invoked GATS Article XIV(a) and (c), arguing that “gambling by remote supply is particularly vulnerable to various forms of criminal activity, especially organized crime. Maintaining a society in which persons and their property exist free of the

²⁹ These are DS2/4 United States — Standards for Reformulated and Conventional Gasoline; DS58 United States — Import Prohibition of Certain Shrimp and Shrimp Products; DS155 Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather; DS285 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services; DS285 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Recourse to DSU Art. 21.5); DS332 Brazil — Measures Affecting Imports of Retreaded Tyres; DS381 United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (First Recourse to DSU Art. 21.5); DS400/401 European Communities — Measures Prohibiting the Importation and Marketing of Seal Products; DS476 European Union – Certain Measures Relating to the Energy Sector and; DS477/478 Indonesia – Importation of Horticultural Products, Animals and Animal Products with respect to subparagraphs (a), (b) and (d) of GATT Art. XX. In the case where more than one specific subparagraph of GATT Article XX is mentioned, the WTO adjudicating bodies analyzed the merit of each exception separately. Therefore, for the purposes of this study, each subparagraph is counted as an individual exception raised by a respondent.

³⁰ Panel Report, Brazil – Retreaded Tyres, at para. 7.356.

³¹ Appellate Body Report, Brazil – Retreaded Tyres, at para. 258(b).

³² Appellate Body Report, Brazil – Retreaded Tyres, at para. 228.

³³ In another prominent GATS case, Panama challenged a myriad of tax measures adopted by Argentina to fight tax evasion through tax havens. The WTO panel ruled against Argentina, finding its policies breached the most favored nation obligation contained in the GATS and that Argentina failed to satisfy the *chapeau* requirements of the general exceptions. The Appellate Body, however, determined that the Panel applied wrongly the most favored nation standard and concluded that Argentina had not breached any GATS obligation, consequently, it did not assess Argentina’s GATS Article XIV defense. See: Appellate Body Report, Argentina – Measures Relating to Trade in Goods and Services, WT/DS453/AB/R, 14 April 2016.

destructive influence of organized crime is both a matter of 'public morals' and one of 'public order.'"³⁴ The United States further stated that the gambling laws in question "are necessary to secure compliance with all the various WTO-consistent US criminal laws violated by organized crime activities."³⁵

In a November 2004 report, a WTO panel found that the United States failed the "necessity" threshold for both of the claimed subparagraphs by not fully exploring and exhausting WTO-consistent alternatives to its gambling laws.³⁶ While noting that it would not be necessary to proceed further, the panel opted to also assess the laws' compliance with the *chapeau* "so as to assist the parties in resolving the underlying dispute in this case."³⁷ The panel then found that the U.S. defense also failed the *chapeau* threshold.³⁸ The Appellate Body overturned the panel's finding on the necessity threshold.

However, the WTO Appellate Body upheld the panel's decision that the U.S. Article XIV defense failed to comply with the *chapeau*, on the basis that the United States had failed to demonstrate that measures against remote gambling, such as those embodied in the Wire Act, "are applied to both foreign and domestic service suppliers of remote betting services for horse racing."³⁹ At issue was a narrow provision of the Wire Act that allows credit card transactions explicitly related to off-track betting on horse racing to be processed across U.S. state lines.

These cases illustrate how the WTO adjudicating bodies' interpretation of the general exceptions and, particularly the *chapeau* language, frequently just disregards the domestic constraints and dynamics that typically underpin public interest policies. Often, in order to enact measures that further public interest objectives, like the protection of public health or safeguarding of public morals, policymakers are required to accommodate the pursuit of these policies in a complex environment. Enacting such policies requires dealing with the domestic political dynamics of constituencies with various economic interests and external constraints, such as the limits imposed by supranational frameworks (e.g., MERCOSUR law), states' autonomy to regulate certain activities or the need to remedy past abuses of minority groups or protect their interests.⁴⁰ The current regime of WTO law ignores these policymaking realities by damning policies that reflect external constraints or political bargains, and, consequently, unduly encroaches on

³⁴ Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, 10 November 2004, at para. 3.279.

³⁵ Panel Report, US – Gambling, at para. 3.275.

³⁶ Panel Report, US – Gambling, paras. 6.533-6.535 and 6.564-6.565.

³⁷ Panel Report, US – Gambling, at para. 6.566.

³⁸ Panel Report, US – Gambling, at para. 6.607.

³⁹ Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 7 April 2005, at paras. 370-372.

⁴⁰ The reasoning of the Appellate Body in the EC – Seal Products case is indicative of the simplistic, unidimensional analysis that disregards the complexities of domestic policy making, which in this case involved a government's policy that gave room to safeguard minority interests to remedy historical wrongs. In this case, Canada and Norway challenged a legal scheme adopted by the EU in 2009 to prohibit the importation and marketing of seal products (EU Seal Regime). The EU's ban had a few exceptions: Most notably, the ban did not apply to products of traditional indigenous hunting via an indigenous communities or IC exception. The EC invoked the GATT Article XX(a) public morals exception, arguing that that the EU Seal Regime was rooted in European public moral concerns regarding seal welfare. The Appellate Body endorsed the panel's conclusion that the policy was necessary to protect EU public morals. However, when assessing the EU Seal Regime under GATT Article XX *chapeau* requirements, the Appellate Body damned the IC exception as irreconcilable with the stated policy objective that provisionally justified the measure, i.e., seals' welfare. The EC countered that it exempted seal products derived from hunts conducted by Inuit and other indigenous peoples in order to mitigate the adverse effects on those vulnerable communities. The Appellate Body insisted that this goal could not be reconciled with the protection of seal welfare and criticized the fact that some IC-hunted seal byproducts could be exchanged for economic gain. Ultimately, this was one of the reasons why the Appellate Body ruled that the policy failed to meet the requirements of the *chapeau*. See: Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014. Paras. 5.316 – 5.339.

states' policy space. As a response to this issue, scholars have argued that WTO adjudicating bodies should adopt a "predominant motive test," under which public interest measures would be deemed consistent with the *chapeau* and then justified under the exceptions as long as their primary objective is one of those permitted by GATT Article XX or GATS Article XIV. Under this test, an exception-based defense would not be dismissed if certain elements of the measure depart from the strict fulfilment of the public policy objective invoked.⁴¹ The extent to which WTO adjudicating bodies would be willing to modify their stringent interpretations of the general exceptions' language to accommodate this proposal is uncertain. In any case, the argument is illustrative of the different ways by which more flexibility could be built into the system and a more appropriate balance could be struck between WTO members' right to regulate in the public interest and their WTO obligations.

Another legal framework feature that WTO member countries should prioritize rebalancing with respect to challenges relating to public interest measures is the burden of proof. Notably, the very first case that was adjudicated by the WTO Appellate Body, U.S.– Gasoline, developed an interpretation of the burden of proof for the conditions set out in the *chapeau* that remains unmodified by subsequent panel and Appellate Body reports. In its 1996 report, the Appellate Body made the respondent responsible to bear the burden of demonstrating that a provisionally justified measure is *not* applied in a manner that results in either arbitrary or unjustifiable discrimination or is a disguised restriction on trade.⁴² This means that the burden of proof for the *chapeau* requirements falls on the party that already has proved that the measure is either necessary, related to or essential for (depending on the subparagraph invoked) the fulfilment of a public policy objective. From a policy perspective, this allocation of burdens does not seem evenhanded. It is even more problematic that the Appellate Body interpretation does not conform with core tenets of international law.

The general rule under international law, which is applicable to most domestic legal systems as well, is that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative proposition.⁴³ The conditions set out in the *chapeau* are negative conditions.⁴⁴ Thus, following this principle, the reasonable allocation of the burden of demonstrating that a respondent is failing to meet these conditions should rest on the complaining party. Consider that with the necessity test, the respondent must prove that the measure is necessary in the sense that it contributes to the fulfilment of an important value or objective, but the burden of proving that the measures is not the least trade-restrictive alternative falls on the complainant.⁴⁵ To that extent, the legal interpretation developed on the *chapeau* unduly places a heavy evidentiary burden on governments that have already demonstrated that their policies have the degree of connection required by the GATT and the GATS with the policy objectives recognized by the agreements as important enough to justify a deviation from the obligations of the parties. This flawed legal interpretation is one that must be addressed in any effort to reform the multilateral trading system.

⁴¹ Meyer, Timothy, The Political Economy of WTO Exceptions (April 1, 2021). *Washington University Law Review*, Vol. 99, 2022, Vanderbilt Law Research Paper No. 21-18, Available at SSRN: <https://ssrn.com/abstract=3817719> or <http://dx.doi.org/10.2139/ssrn.3817719>

⁴² Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, at pages 22-23.

⁴³ Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, 25 April 1997, at page 14.

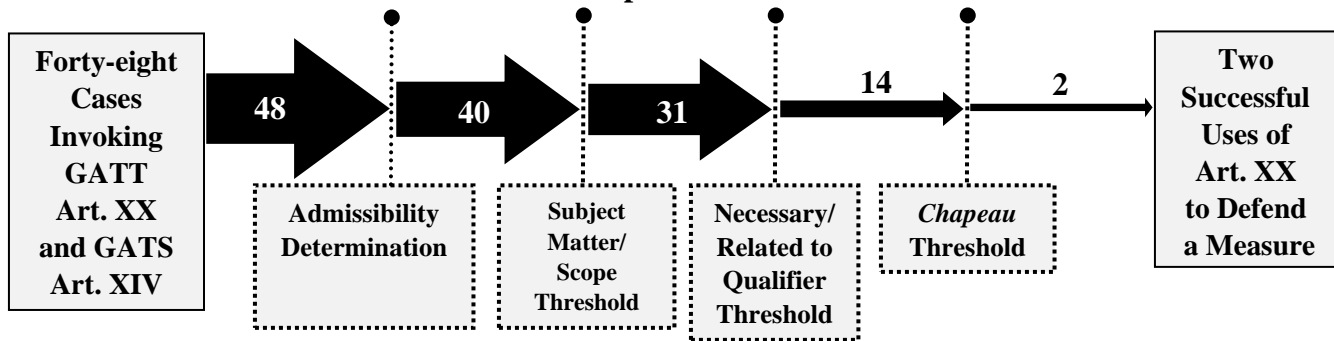
⁴⁴ Joost Pauwelyn, "Evidence, Proof and Persuasion in WTO Dispute Settlement - Who Bears the Burden," *Journal of International Economic Law* 1, no. 2 (1998): 227-258. Ft. 38.

⁴⁵ Appellate Body Report, US – Gambling, at paras. 309-311.

The Two Policies Found Justified Under the Exceptions

Of the 48 occasions in which the WTO adjudicating bodies have analyzed GATT Article XX and GATS Article XIV defenses, only in two cases have a country's measures been deemed to meet all of the tests to qualify for a general exception defense. The graphic below summarizes this less than 5% "success" rate.

Figure 1. The Pathway for the Two Instances of Respondents Successfully Invoking the General Exceptions Defense



Source: Public Citizen's Global Trade Watch WTO General Exceptions Database, an analysis of the rulings post by the WTO at www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

The two instances in which the Appellate Body eventually ruled that the challenged measures were justified under the general exceptions have several elements in common: Both had the United States as respondent and were related to measures aimed at the conservation of exhaustible natural resources (GATT Article XX(g)). And, in the two cases, the United States initially lost the dispute, changed the challenged policies, and then the modified measures were cleared through WTO compliance proceedings.

In the first case, U.S. – Shrimp, India, Malaysia, Pakistan and Thailand challenged the import ban adopted by the United States with respect to shrimp harvested without use of a technology that prevents sea turtles from getting caught in fishing nets, known as a turtle excluder device (TED). Notably, U.S. domestic shrimpers are required to use the same technology. The U.S. government conceded that the measure constituted a quantitative restriction in the sense of GATT Article XI but argued that it qualified for an exception under GATT Article XX(g). The Appellate Body agreed with the United States insofar that the import ban complied with the requirements of subparagraph (g) of Article XX of the GATT. However, the adjudicating body considered that the measure was applied in a manner that amounted both to unjustifiable and arbitrary discrimination between countries where the same conditions prevail. In reaching this conclusion, the Appellate Body gave special weight to the fact that the United States did not enter into negotiations with every country that could have been potentially affected by the import ban.⁴⁶ Additionally, the adjudicating body deemed that the United States was being inflexible and rigid by requiring other WTO members to adopt a policy that “is essentially the same as the United States’ program.”⁴⁷

After losing on the exception and the case, the United States modified its policy to address the issues raised by the WTO Appellate Body. Malaysia believed that the revised policy still did not conform with

⁴⁶ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, at paras. 166-172.

⁴⁷ Appellate Body Report, US – Shrimp, at paras. 177-183.

the requirements of GATT Article XX and brought a compliance claim against the United States. Buttressed by the Appellate Body findings in the original dispute, Malaysia, among other arguments, claimed that the United States not only had an obligation to negotiate with other countries, but was required to conclude an international agreement before taking any unilateral action.⁴⁸ In its 2001 report, the Appellate Body had to nuance its own findings from three years prior. It held that requiring a multilateral agreement to be concluded to avoid arbitrary or unjustifiable discrimination claims would mean that any country party to the negotiations could obstruct the regulatory efforts of the country trying to enact environmental policies, which would be unreasonable. Applying that logic, the Appellate Body endorsed the panel's conclusion that the United States had engaged in serious, good faith negotiations with countries in the Indian Ocean and South-East Asia region and thus did not engage in arbitrary or unjustifiable discrimination. This was the first case in which the WTO adjudicating bodies allowed the application of the general exceptions to justify a domestic policy that otherwise violated GATT obligations.⁴⁹

Seventeen years elapsed before the Appellate Body recognized that another policy met the requirements of the *chapeau* of GATT Article XX. This decision came at the end of the lengthy Tuna-Dolphin saga, which was a series of cases starting in 1991 in which the United States was challenged by various countries for policies aimed at preventing dolphin injury and mortality through tuna fishing activities. The U.S. Marine Mammal Protection Act banned sale in the United States of tuna caught by "setting on dolphins." Also known as encirclement purse seine netting, this method of catching yellowfin tuna, particularly in the Eastern Tropical Pacific Ocean (ETP), killed and injured millions of dolphins before it was banned. The first two cases were pre-WTO GATT cases in which Mexico and then the European Communities challenged the import ban. In both instances, the GATT panels ruled against the United States and decided that the GATT general exceptions could not be invoked to justify U.S. pro-environment policies, although the panel reports were never adopted under the GATT positive consensus rules.⁵⁰ The United States and Mexico tried to settle their differences, including by negotiating the Agreement on the International Dolphin Conservation Program (AIDCP) in 1999 under the auspices of the Inter-American Tropical Tuna Commission (IATTC). The AIDCP sets out a labelling scheme by which a "dolphin-friendly" label is allowed for tuna caught by boats with observers that certify there was "no significant adverse impact" on dolphin mortality. However, this standard was not adopted in the United States since the NGO Earth Island Institute brought a lawsuit against the Department of Commerce for it to apply the more stringent domestic rule contained in the Dolphin Protection Consumer Information Act (DPCIA), which required proof that tuna was not harvested by intentionally setting on dolphins with purse seine nets. This was the origin of the tuna-dolphin WTO disputes.⁵¹

In 2009, Mexico launched a WTO claim against the DPCIA, the related implementing regulations, and the 2007 U.S. federal ruling in the aforementioned case brought by Earth Island Institute. Since the initial proceedings revolved around the TBT Agreement, the United States did not attempt to justify its measure through GATT Article XX. The Appellate Body ultimately determined that the U.S. measures were inconsistent with the non-discrimination obligation of the TBT Agreement. The Appellate Body took issue with the fact that while the fishing method of setting on dolphins was prohibited everywhere in the world,

⁴⁸ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, 22 October 2001, at para. 116.

⁴⁹ Appellate Body Report, United States – Shrimp (Article 21.5), at paras. 123-134.

⁵⁰ For an extended discussion of these first two cases see: Alvaro Santos, "Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico" (2012). Georgetown Law Faculty Publications and Other Works. 885.

⁵¹ Elizabeth Trujillo, "The Tuna-Dolphin Encore - WTO Rules on Environmental Labeling," *Insights*, Vol 16.7, March 07, 2012. Available at: <https://www.asil.org/insights/volume/16/issue/7/tuna-dolphin-encore-wto-rules-environmental-labeling>

it was mostly used in the ETP (where most Mexican tuna is harvested); and, according to the adjudicating body, in other regions fishing methods different from setting on dolphins also caused harm to this mammal but were, nevertheless, not regulated by the U.S. labelling requirements.⁵² In 2013, the United States adopted a new regulation to comply with the Appellate Body's ruling. The new regulation included requirements for tuna harvested outside of the ETP to be eligible for the dolphin-safe labelling. However, later on Mexico brought a compliance claim against the new measures. This time the U.S. government did raise GATT Article XX exceptions. However, the Appellate Body still determined that the policy afforded less favorable treatment to Mexican tuna compared to like tuna products and that it was not justified under GATT Article XX.⁵³ In 2018, the United States changed its policy again to try to satisfy the latest WTO ruling, augmenting requirements for tuna harvested outside of the ETP and adding conditions for tuna fisheries beyond those using large purse seine nets. And both the U.S. and Mexican governments initiated compliance proceedings on the case. In response, the Appellate Body accepted that the U.S. dolphin-safe labelling scheme was justified under GATT Article XX(g).⁵⁴ Notably, some commentators have mentioned that this last decision is an indication of the Appellate Body's efforts to deal with the WTO legitimacy problems vis-à-vis the civil society, as well as the states that have seen their sovereignty encroached.⁵⁵

Ensuring Trade Agreements Adequately Safeguard Policy Space to Attain Non-Commercial Goals

The failure to guarantee an adequate balance between WTO obligations on the one hand and safeguarding countries' right to enforce domestic public interest policy on other important matters is at the heart of the WTO's legitimacy crisis. As this analysis shows, there are several aspects of the general exceptions' design and structure that require a major overhaul so that WTO adjudicating bodies grant more deference to respondent parties seeking to defend their public interest measures. Below are recommendations that countries should consider in the context of broader reforms to the WTO Agreements and as they assess the general exception language proposed in new agreements both within and outside the WTO.

The most critical changes relative to the GATT/GATS general exception language that would be necessary to construct effective general exceptions are:

- 1. Widening the scope of coverage:** The subject matter of domestic policies that could be implicated by existing and new trade agreements is vast. Additionally, as shown by the wide array of policy measures that have been discussed under GATT Article XX(d), the subparagraph covering policy objectives related to the compliance with laws and regulations not themselves inconsistent with the GATT, the current scope of GATT Article XX and GATS Article XIV is too narrow. This subparagraph has been invoked to justify measures ranging from those directed to protect consumers by preventing deceptive practices to actions aimed at reducing drug trafficking to policies supporting

⁵² Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, 16 May 2012, at paras. 407-408.

⁵³ Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico, WT/DS381/AB/RW, 20 November 2015, at paras. 7.266, 7.340 and 7.360.

⁵⁴ Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by the United States and Second Recourse to Article 21.5 of the DSU by Mexico, WT/DS381/AB/RW/USA, WT/DS381/AB/RW2, 14 December 2018, at paras. 6.288-6.290.

⁵⁵ David Sifonios & Andreas Ziegler, "'Tuna Dolphin Forever'? The Development of the PPM Debate Related to Trade and Environment in the WTO," *Indian Journal of International Economic Law*, 12, 2020, 106-133.

the transition to a decarbonized economy. Moreover, the fact that the WTO members that have invoked this defense often face a roadblock when the Appellate Body or a panel determines that their measures failed to meet the subject matter/scope threshold indicates that there should be more specific exceptions that explicitly recognize the policy objectives that are pursued by these measures.

Thus, an effective general defense would need to expand beyond the scope of even GATT Article XX, which is more expansive than GATS Article XIV. For instance, GATT Article XX covers natural resources and historical, cultural or artistic treasures,⁵⁶ but GATS Article XIV does not. Neither covers countries' obligations under other international treaties, such as those covering indigenous rights, core labor standards,⁵⁷ culture,⁵⁸ tobacco control and more.

Of particular relevance is clarifying the way in which the WTO Agreements interplay with other bodies of international law, especially those related to the preservation of the environment and the furtherance of labor rights. As shown by the India – Solar Cells case, the WTO general exceptions framework does not give value to international instruments dealing with climate change. In a decisive moment for the global challenge of adjusting our economies to reduce their impact on the environment and to counter the climate crisis, it is essential that trade agreements give deference to the undertakings aimed at promoting a just green transition. In that vein, some scholars have argued that subparagraphs (b) and (g) of GATT Article XX could be amended to include explicit reference to multilateral environmental agreements; and subparagraph (e) could be expanded to cover more core international labor standards.⁵⁹

2. Limiting panel or Appellate Body discretion with respect to what domestic policies are necessary: As noted above, WTO jurisprudence on the “necessary” threshold has not been consistent, with rulings ranging from judgments about whether a policy itself is necessary to whether the degree of trade restrictiveness it entails is necessary. And, even after the Appellate Body moved, theoretically, to a more defense-friendly interpretation of necessity with its Brazil – Retreaded Tires report, respondents have continued to face negative odds on passing this test, with an overall failure rate of 61%. Many legal scholars have criticized the Appellate Body's argumentations on the necessity test since its members tend to judge the value of the policy goal invoked using their own value system and exhibiting opaque reasoning on how the elements of the necessity balancing test interact when applied to the particular circumstances of a case.

⁵⁶ During the negotiations of the GATS, the EU was pushing for the inclusion of a subparagraph in Article XIV for cultural purposes. However, the United States vehemently opposed to such an exception, therefore, the EU relinquished on this idea but abstained from undertaking commitments on its audiovisual services sector. See: Sandrine Cahn & Daniel Schimmel, “The Cultural Exception: Does It Exist in Gatt and Gats Frameworks How Does It Affect or is It Affected by the Agreement on TRIPS,” *Cardozo Arts & Entertainment Law Journal*, 15(2), 1997, 281-314.

⁵⁷ Sharan Burrow and Phil Bloomer, “*Reform or Bust – No WTO without workers' rights for fair competition*,” July 5, 2021, Business & Human Rights Resource Centre. Available at: business-humanrights.org/en/blog/reform-or-bust-no-wto-without-workers-rights-for-fair-competition/

⁵⁸ During the United Nations Educational, Scientific and Cultural Organization (UNESCO) negotiations related to a culture convention in the 2000s, several countries, led by Canada and France, pushed for including language that guaranteed an exception for cultural products from the WTO, particularly vis-à-vis the GATS. These efforts were relentlessly rebuffed by the United States, and, at the end, the provisions included in the Convention in the Protection and Promotion of the Diversity of Cultural Expressions dealing with its relations with other international treaties are vague and contradictory. To that extent, their potential to override WTO obligations is rather limited. Thus, the need for including a culture exception in the WTO framework. See: Christopher M. Bruner, “UNESCO, the WTO, and Trade in Cultural Products” in *Essays on the Future of the World Trade Organization, Vol. I*, Julien Chaisse & Tiziano Balmelli (eds), Editions interuniversitaires suisses – Edis, 2008.

⁵⁹ Chantal Thomas, “Should the World Trade Organization Incorporate Labor and Environmental Standards,” 61 *Wash. & Lee L. Rev.* 347 (2004), <https://scholarlycommons.law.wlu.edu/wlulr/vol61/iss1/6>

Perhaps the best way to limit adjudicating bodies' discretion would be to replicate with slight modification the footnote that is included in the Essential Security exceptions of many U.S. free trade agreements (FTAs), which provides a precedent for how to construct a *self-judging* exception.⁶⁰ This footnote language requires that if a party invokes the exception in an investor-state arbitral proceeding or a state-state dispute settlement tribunal, the tribunal or panel hearing the matter shall find that the exception applies. Recently, the parties to the Regional Comprehensive Economic Partnership (RCEP) went a step further and, with regard to its data localization requirements obligation, added a security exception that prevents its parties from even raising challenges against other countries' policies if the latter consider them necessary for the protection of essential security interests.⁶¹ And, with regard to policy objectives beyond national security, RCEP also contains a *self-judging* exception to data localization obligations that empowers the country invoking this defense to determine whether the policy is necessary to achieve the public policy objective.⁶² If the construct of the GATT and GATS general exceptions is revised or new agreements incorporate their structure, then exceptions language should be modified, in a similar vein, to clarify that if a country invokes the exception and proves that the challenged policy is "designed to" fulfill the public policy objective targeted in the subparagraph invoked, the measure is treated as necessary.

Another approach recently used in investment agreements that include general exceptions inspired by GATT Article XX is to replace the "necessity" standard with a "designed and applied to" threshold for all subparagraphs.⁶³ One benefit of this language is that it would limit adjudicating bodies to an analysis similar to that conducted when GATT Article XX(g) on measures "related to" conservation of exhaustible natural resources is invoked, instead of the intrusive necessity test analysis now performed. Given that 62% of the "related to" qualifier exception uses have passed the threshold while the necessity test has a 61% failure rate, this approach could afford more deference to domestic public interest policies related to the protection of public health and public morals, among other objectives.

A less fulsome alternative would keep part of the necessity test but remove its most problematic element, i.e., the trade restrictiveness analysis. Under this approach, if the respondent demonstrated that its challenged policy contributed to an objective covered by the scope of the invoked subparagraph, then the measure would be considered "necessary" and provisionally justified under the subparagraph. This approach could facilitate exceptions for public interest measures while the language of the *chapeau* would still apply so the exceptions could not be abused.

3. Adjusting the *chapeau* terms to the realities of domestic policymaking: Limiting the discretion of adjudicating bodies to define what is required to meet the *chapeau* tests would also be critical. WTO tribunals have often disregarded the domestic constraints and dynamics that are inherent in

⁶⁰ See, for example, U.S.-Peru Trade Promotion Agreement, U.S.-Peru, Article 22.2: "Essential Security: Nothing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."² For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies."

⁶¹ See Regional Comprehensive Economic Partnership (RCEP) Agreement, Article 12.14.3(b): "3. Nothing in this Article shall prevent a Party from adopting or maintaining: (...) (b) any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties."

⁶² See RCEP Agreement, Article 12.14.3(a): "3. Nothing in this Article shall prevent a Party from adopting or maintaining: (a) any measure inconsistent with paragraph 2 that it considers necessary to achieve a legitimate public policy objective¹² provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; (...) ¹²For the purposes of this subparagraph, the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party."

⁶³ See, for instance, Investment Agreement for the COMESA Common Investment Area, art. 22(1).

democratic policymaking, damning policies that reflect external constraints (technological or budgetary limitations for instance) or the political compromises necessary to enact policies. This species of flawed analysis typically is present during consideration of whether a challenged policy complies with the *chapeau* requirements. One redress would be to add what Vanderbilt University Law School Professor Timothy Meyer calls a “predominant motive test” into the introductory clause of GATT Article XX and GATS Article XIV. Meyer has proposed to modify the *chapeau* terms to state: “Subject to the requirement that arbitrary or unjustifiable discrimination between countries where the same conditions prevail is not the predominant objective of such measures (...).”⁶⁴

Such language would force WTO adjudicating bodies to give deference to the realities of domestic policymaking and refrain from striking down policies just because they could have discriminatory effects, but for which there is no evidence of such intent, or, because the challenged policy is modulated to reflect political compromises or external constraints. A policy would only be inconsistent with the *chapeau*, and consequently not justified under the general exceptions clause, if the complainant demonstrates that arbitrary or unjustifiable discrimination was the predominant motive of the respondent country when adopting or applying the measure. This approach would be an interesting way to build more flexibility into the system and achieve a more appropriate balance between countries’ right to regulate in the public interest and their WTO obligations.

4. Placing the burden of proof on the complaining party with regards to the thresholds established in the *chapeau*: Any general exception with a “specific exception-general requirements” structure should include clear rules of burden of proof where the responsibility to demonstrate that a public interest policy is applied in an arbitrary or unjustifiably discriminatory fashion falls on the country challenging the measure. As articulated above, this approach would be consistent with the core tenets of public international law.

Additionally, countries should consider extending the coverage of the general exceptions – as strengthened by the above recommendations – to other WTO agreements, such as the TBT and SPS Agreements, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and any and all sector-specific services agreements. This brief shows that some member countries believed that the general exceptions would apply to these specific WTO commitments. Moreover, since these agreements have stringent regulatory homogenization requirements (for instance, basing regulations on international standards), the WTO adjudicating bodies’ interpretations have left countries without any affirmative defenses to safeguard against challenges of their regulatory actions.⁶⁵ This has created an imbalance that favors complainants in dispute settlement proceedings, which should be addressed.

Further discussion is warranted regarding the need to expand the reach of the exceptions to other WTO agreements. Wide coverage would help governments to defend public interest policies that pursue important societal values while meeting other WTO requirements. Additionally, it would clarify that existing and any potential future WTO obligations do not trump protection of the environment, promotion of labor rights, furtherance of public health or other societal objectives. However, further research and analysis is needed to ensure the right balance. Just as today the WTO exceptions do not provide sufficient

⁶⁴ Meyer, Timothy, “The Political Economy of WTO Exceptions” (April 1, 2021). *Washington University Law Review*, Vol. 99, 2022, Vanderbilt Law Research Paper No. 21-18, Available at SSRN: <https://ssrn.com/abstract=3817719> or <http://dx.doi.org/10.2139/ssrn.3817719>. P. 67.

⁶⁵ While Article 2.4 of the SPS Agreement does establish that measures that conform with the SPS disciplines are presumed to be justified under GATT Article XX(b), this only means that the SPS Agreement added requirements for a sanitary or phytosanitary measure to be justified by the general exceptions of the GATT. The practical consequence being that a respondent could prove that a SPS measure is necessary to protect the public health, that it is neither arbitrarily or unjustifiably discriminatory nor a disguised restriction on trade and still run afoul of its WTO commitments.

policy space to safeguard legitimate public interest policies, it is important that broad, effective exceptions cannot be abused to deprive countries from remedies against governmental efforts to promote strategic industries that distort international markets. For instance, while granting financial incentives for producers to transition to greener technologies is sensible, these policies also could distort competition in international markets, and affected countries should have recourse to remedies. Thus, whether strengthened general exceptions should apply to instruments such as the Agreement on Subsidies and Countervailing Duties, for example, requires further analysis.

Presumably, it would be easier to implement the changes proposed to the GATT/GATS general exception language to construct effective exceptions in new or even existing FTAs, including in the investment chapters that grant access to the Investor-State Dispute Settlement System (ISDS). As mentioned before, some recent FTAs have altered the general exception boilerplate language that is based on GATT Article XX.

However, this analysis' focus on the uselessness of the current WTO exceptions clauses spotlights a more fundamental problem: The rules of the WTO and many FTAs systematically prioritize commercial interests over the public interest and brand this highly subjective power shift as somehow related to "trade." Domestic public interest policies, including those that apply equally to domestic and foreign goods, services and firms, that conflict with expansive commercial rules that extend far beyond trade policy become labeled as "trade barriers." Such policies must be altered or eliminated unless they satisfy nearly impossible standards to qualify for an exception. This dynamic is why, increasingly, countries and public interest advocates seek to alter the underlying rules or include broad exclusions and carveouts in "trade" deals. The tobacco control measures ISDS carveout negotiated for the Trans-Pacific Partnership (TPP) that became the basis for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is an example of this approach.⁶⁶ Although the existing examples are limited, carveouts and exclusions could potentially achieve a better balance between commercial interests and public policy objectives and place a higher standard of proof on the country challenging another's public interest policies.

Effective general exceptions in today's expansive international commercial agreements cannot simply replicate GATT Article XX and GATS Article XIV language. The limited scope of those exceptions and the way in which the threshold tests have largely limited their application are disqualifying. To remain viable, the architecture of the multilateral trade system requires a major overhaul and any new agreement must include language that actually preserves the policy space needed to address the major challenges of our times.

⁶⁶ See Trans-Pacific Partnership, Article 29.5: Tobacco Control Measures: A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure¹² of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.



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