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Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception

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As negotiations on a Trans-Pacific Partnership (TPP) have resulted in near-complete texts for many of the pact’s 29 chapters, leaked texts have revealed that many of the most damaging provisions from past “free trade” agreements (FTAs) are being replicated in the TPP. Indeed, proposals made by consumer, environmental, health, labor and other civil society organizations and national and state legislators in many TPP countries have been systematically rejected in favor of corporate demands to further *expand* on past FTAs’ terms that limit public interest regulation and establish new corporate privileges.

As anger about regressive TPP rules has increased, negotiators have responded by claiming that the pact will include “exceptions” language that can safeguard public interest policies that the pact would otherwise undermine. Yet, the exceptions language being negotiated for the TPP is based on the same construct used in Article XX of the World Trade Organization’s (WTO) General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS). This is alarming, as the GATT and GATS exceptions have only ever been successfully employed to actually defend a challenged measure in one of 44 attempts. That is, the exceptions being negotiated in the TPP would, in fact, not provide effective safeguards for domestic policies.

The combination of retrograde TPP obligations and ineffective exceptions is extremely threatening to public interest policymaking. Only five of the TPP’s 29 chapters pertain to traditional trade matters. The rest would set rules to which countries would be required to conform domestic policies relating to regulation of energy and other services, financial regulation, food safety, procurement policy, patents and copyright policy, and other non-trade issues. The draft pact also includes the controversial investor-state enforcement system and extensive investor rights and privileges that could conflict with signatory countries’ health, environmental and other policies. The investor-state system elevates individual corporations to the same status of sovereign States, empowering them to privately enforce a public treaty by challenging governments in extrajudicial tribunals. The tribunals are staffed by private sector attorneys who can order government payment of unlimited cash damages for public interest policies that the corporations claim undermine their expected future profits.

The Dismal Record of the GATT Article XX and GATS Article XIV Exceptions

In 43 WTO cases, GATT Article XX has been invoked by a Respondent seeking to defend a challenged measure. In one WTO case, GATS Article XIV has been invoked. In only one of these 44 cases, EC – Asbestos, were all conditions for application of a GATT or GATS general exception

deemed satisfied. Of the 44 cases, the general exception was determined to be relevant enough to be considered in 33 cases. Thirty-two of those 33 cases failed to satisfy one of the three threshold tests required for application of the general exception:

- Five 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;
- Eighteen cases failed on the "necessary" or "related to" threshold; and
- Nine cases failed on the *chapeau* threshold, with a tribunal finding arbitrary or unjustifiable discrimination in the measures' application.

In the context of the TPP, repeating the ineffective GATT/GATS general exception construct would be even more dangerous because, unlike the WTO, the TPP is slated to include investor-state enforcement. The scope of domestic policies implicated by the TPP's Investment Chapter and its substantive obligations, such as those relating to expropriation and a minimum standard of treatment, will be WTO-plus. As such, a TPP general exception would need to cover the investment chapter as a first-order concern. Second, for a TPP general exception that covers the TPP Investment Chapter to be effective, its coverage would also need to be WTO-plus. That means it would need to provide a defense for more policy areas than those covered in GATS Article XIV or GATT Article XX. Third, the thresholds required to successfully apply the defense would need to be WTO-minus, not only because those thresholds have hobbled the exceptions' efficacy in WTO cases, but also because the substantive obligations of the TPP Investment Chapter would impose more constraints on domestic policy space than WTO rules do.

That is to say, an effective TPP general exception that covers the Investment Chapter would need to be crafted so that governments have a better chance that it can be successfully employed, in part by remedying the issues that have thwarted successful application of the WTO general exceptions. However, even if the WTO general exceptions had a record of being successfully used to defend challenged measures, an effective TPP general exception would need to be more robust because the TPP Investment Chapter's impact on domestic policy space would be WTO-plus. (And, of course, the most surefire way to defend domestic policy space for important public interest policies is to not replicate the substantive terms of past "trade" agreements that have undermined such policies.)

It is also worth noting that repeatedly the WTO Appellate Body has reversed WTO panels' findings that measures countries sought to defend under GATT Article XX did not meet the necessity test. Yet, unless the TPP is to break new ground among FTAs and include an appeals body, such "corrections" will not be available in the TPP state-state dispute resolution context. And, with respect to investor-state enforcement, there is not only no means to appeal overreaching interpretations, but indeed enormous discretion for each tribunal to create its own interpretations of substantive obligations with no basis in any precedent.

As noted above, some TPP countries have sought to include provisions in the TPP's Exceptions Chapter that read-in the GATT Article XX and GATS Article XIV exceptions. Others have sought to include a general exception within the Investment Chapter. As described in the conclusion of this memo, wherever the language is placed, the most important changes to the GATT/GATS general

exception model that would be necessary to design an effective general exception for TPP that covers the Investment Chapter are:

- Ensuring coverage of a wide range of domestic policies. GATT Article XX covers natural resources, but GATS Article XIV does not. Neither cover historical, cultural or artistic treasures nor countries' obligations under other international treaties, such as those covering indigenous rights, culture, tobacco control and more;
- Making clear that governments, not trade and investment tribunals, shall determine when a domestic policy is "necessary," with trade and investment tribunals' remit limited to considering whether the measure has been applied, for instance, with the intent of unjustified discrimination;
- Lowering the thresholds for successful use of the defense by clarifying what standard of proof is required if terms associated with a body of WTO jurisprudence, such as "arbitrary or unjustifiable discrimination" are employed. (If the term "necessary" is not excluded from tribunals' remit as suggested above, a less fulsome approach would be to also clarify the standard of proof for that term.);
- Lowering the thresholds for successful use of the defense by clarifying that the burden of proof rests with the Claimant with respect to showing a measure does *not* meet the requirements of the exception; and
- Providing for an early opportunity to raise the exception in investor-state cases, where the expense of prolonged arbitration often is used as a means for investors to pressure countries to alter policies even if the claim is likely to fail on the merits.

GATT Exception Fails in 97 Percent of Cases

In WTO cases in which the respondent country has tried to use a GATT Article XX defense, the Respondent has lost both the defense and the case more than 97 percent of the time.¹ That failure rate exceeds even the overall "loss" record of Respondents in WTO dispute resolution – the respondent country has lost about 93 percent of the WTO cases reaching a final ruling.

Using the GATT Article XX exception as a successful defense 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 subparagraph under Article XX that the Respondent cites as the basis for the defense, while the third threshold relates to the Article XX *chapeau*. 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. For subparagraphs naming a policy objective, WTO panels and the Appellate Body have typically required that the policy in question be designed to fulfill that objective (e.g., for an 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 Article XX, the qualifier threshold requires that the policy measure be "necessary" for the subparagraph's named policy objective (e.g., measures for which Article XX(b) is invoked must be "necessary to protect human, animal or plant life or health"), or that the

policy measure be “relating to” the objective (e.g., measures for which 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 may require *all* of the following conditions to be satisfied:

- a. The objective of the policy must be legitimate (as determined by the panel or Appellate Body).
 - b. The policy measure must contribute to 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. (What precisely is required to meet this prong of the test is a moving target, which the Appellate Body continues to define over time.)
- 3. *Chapeau*:** The Article XX *chapeau* contains 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.”

Forty-three WTO cases have invoked GATT Article XX.² Of those 43 cases, the panel or Appellate Body decided to examine the exception in 32 cases, determining the Article XX defense to be irrelevant in the remaining 11 cases.³ For instance, in the US – 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. In response to that claim, 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.”⁴ In its September 2011 report, the WTO panel decided that, having found the U.S. cloves ban to violate the WTO’s Agreement on Technical Barriers to Trade, it would not consider Indonesia’s claim of a GATT violation nor the U.S. GATT Article XX defense.⁵ The Appellate Body merely noted the panel’s decision with respect to not examining the GATT claims, granting it no further consideration.⁶

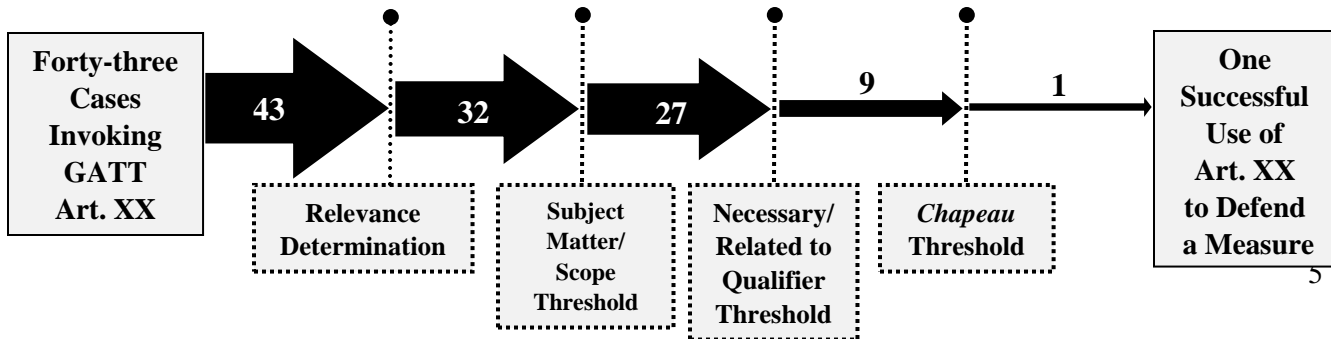
Of the 32 cases where the general exception was deemed relevant, five failed the subject matter/scope threshold.⁷ For instance, in the EC – Tariff Preferences case, India challenged as a GATT violation a system of tariff preferences employed by the European Communities to combat drug trafficking. The 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 European Communities.”⁸ 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.”⁹ The Appellate Body noted the panel’s decision, granting it no further consideration.¹⁰

Of the remaining 27 cases, 18 failed the qualifier (“necessary,” “related to”) threshold.¹¹ Because the WTO Appellate Body has been modifying the interpretation of this threshold with respect to the meaning of “necessary,” we do not cite an emblematic case. However, it is worth noting that in cases, such as Brazil – Retreaded Tyres, in which the Appellate Body has applied a more defense-friendly weighing and balancing interpretation¹² of the necessary threshold (relative to infamous past GATT and WTO cases in which panels have applied an absolutist “least trade restrictive” test), use of Article XX has still failed on the *chapeau* threshold.

Of the remaining nine cases, eight failed the *chapeau* threshold.¹³ In the Brazil – Retreaded Tyres case, the European Communities challenged as a GATT violation 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 tyre waste, and its accumulation and disposal, which presents well-recognized dangers to public health and the environment.”¹⁴ These include “cancer, dengue, reproductive problems, environmental contamination, and other associated risks.”¹⁵ In its June 2007 report, the WTO panel found that the tire import ban was relevant to the protection of “human, animal or plant life or health,”¹⁶ that this objective was legitimate,¹⁷ that the ban contributed to this objective, that less trade restrictive alternative measures were not tenable, and that the import ban was thus “necessary.”¹⁸

Still, 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.”¹⁹ 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.”²⁰ In coming to this conclusion, the Appellate Body focused on an exception to Brazil’s ban for MERCOSUR countries, 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.”²¹

The single remaining WTO case to invoke GATT Article XX, EC – Asbestos, is the only instance in which a country’s measure has been deemed to meet all of the tests to qualify for an Article XX general exception defense. The graphic below summarizes this less than 3 percent “success” rate.



No Successful Application of GATS Article XIV Exception that Mirrors GATT Article XX

Article XIV of the GATS contains a general exception that parallels GATT Article XX. The *chapeau* text is nearly identical, and three of the five subparagraphs closely match subparagraphs (a), (b), and (d) of GATT Article XX – three of the most-invoked subparagraphs. The barriers that countries face in mounting a successful GATS Article XIV defense mirror those of GATT Article XX: the WTO panel and/or Appellate Body must determine that the policy measure is designed for the objective stated in the subparagraph, that the measure is “necessary” for fulfillment of the objective, and that the requirements of the *chapeau* are satisfied.

There has only been one WTO case in which the Respondent invoked GATS Article XIV: US – Gambling. The United States lost both the 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 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 destructive influence of organized crime is both a matter of ‘public morals’ and one of ‘public order.’”²² 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.”²³

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.²⁴ 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.”²⁵ The panel then found that the U.S. defense also failed the *chapeau* threshold.²⁶ The Appellate Body overturned the panel’s finding on the necessity threshold, a scenario that would not be possible in investor-state dispute resolution, nor in state-state TPP dispute resolution, unless the TPP is to break new ground among FTAs and include an appeals body.

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.”²⁷ 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. Recently, Antigua has threatened to impose WTO-authorized sanctions against the United States for not changing its policy by setting up an online facility to sell downloads of American intellectual property, such as Hollywood films, network television shows or hit pop songs, to recoup the amount of money that the WTO has determined Antigua lost in online gambling because of the U.S. policy.²⁸

Designing an Effective TPP General Exception that Applies to the Investment Chapter

An effective TPP general exception that covers the Investment Chapter cannot simply “read-in” GATT Article XX and GATS Article XIV, given both the limited scope of those exceptions and the way in which the threshold tests in those measures have largely limited their application. However,

elements of the language of the GATT and GATS general exception measures could be employed, with changes to remedy these shortcomings.

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

1. **Widening the Scope of Coverage:** The subject matter of domestic policies that could be implicated by the TPP Investment Chapter is vast, and 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 but GATS Article XIV does not. Neither cover historical, cultural or artistic treasures, nor countries' obligations under other international treaties, such as those covering indigenous rights, culture, tobacco control and more. It would also be critical that the text make explicit that the exception covers all provisions of the Investment Chapter and be applicable in both state-state and investor-state enforcement actions.
2. **Lowering the Thresholds that Must Be Met for Successful Application of a General Exception:** A review of the many WTO cases in which attempts to use a general exception were rejected shows two problems that require redress. First is ensuring that countries' governments, not trade and investment tribunals, determine when a domestic policy is "necessary," with trade and investment tribunals' remit limited to considering whether the measure has been applied, for instance, with the intent of unjustified discrimination. Second is clarifying that the burden of proof rests on the country or investor challenging a domestic measure to show why the general exception does *not* apply, with a presumption that it does, which would be established by the Respondent providing *prima facie* evidence to that effect.
 - **Limiting panel or arbitral tribunal 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. Closing such discretion would be especially critical in an agreement with no appeals process for state-state cases and with the establishment of investor-state enforcement. Investor-state tribunals have applied wide discretion in interpreting agreement terms, and their interpretations are not subject to appeal.

Perhaps the best way to limit tribunal discretion would be to replicate with slight modification the footnote included in all U.S. FTAs' Essential Security exceptions, which provides a precedent for how to construct a *self-judging* exception.²⁹ 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. If a TPP general exception is to replicate the construct of the GATT and GATS general exceptions, then a footnote could be placed on the term "necessary" to clarify that if a country invokes the exception, the measure is presumed to be necessary. For instance, something to the effect of:

¹For greater certainty, if a Party invokes Article [XT – general exception] in an arbitral proceeding initiated under Chapter [XT] (Investment) or Chapter [XT] (Dispute Settlement), the tribunal or panel hearing the matter shall find that the measure is necessary.

A less fulsome alternative would rely on terms such as “necessary” being explicitly defined. If a TPP Investment Chapter general exception uses the “necessary” qualifier, then additional text could be added to the effect of: “for a measure to be necessary the Respondent/Party Complained Against applying the defense is not required to establish that no less trade restrictive alternative exists to fulfill its objective. The Claimant/Complaining party must establish that a technologically and practicably feasible less trade-restrictive alternative exists and that the cost of its application is not significantly greater than the challenged measure.” (The small-case “p” in “Complaining party” is to make clear that both investors and signatory countries are covered.)

- **Proving More Explicit Definitions of *Chapeau* Terms:** Limiting the discretion of panels and tribunals to define what is required to meet the *chapeau* tests would also be critical. WTO tribunals have found unjustified discrimination with respect to measures that have discriminatory effects, but for which there is no evidence of such intent. Thus, for instance, language specifying what must be proved for a *chapeau* violation could clarify that to qualify as a violation of the *chapeau* test discrimination associated with a policy measure must be shown to be by intent of the measure, and not merely by effect. For instance, language could be added to the effect of: “a facially neutral measure does not result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail merely because such measure may have a disparate effects in application, With respect to a facially neutral measure, the Claimant/Complaining party seeking to show arbitrary and unjustifiable discrimination or that a measure is a disguised restriction on international trade must establish that the intent of the Respondent/Party Complained Against was to provide less favorable treatment to another party.”
 - **Placing the burden of proof on the Claimant/Complaining party to demonstrate not only that the challenged measure fails the qualifier (“necessary,” “related to”) test, but also the thresholds established in the *chapeau* language (if the GATT-GATS text is replicated) or other anti-abuse language.** This could be achieved by inclusion of text that specifies that a Respondent seeking to apply the exception must make a *prima facie* showing that it applies and then the Complainant must prove it does not.
3. **Ensuring that a General Exception Can Be Raised Early in Investor-State Proceedings:** An unfortunate trend in investor-state litigation is the filing of such cases merely to pressure governments to alter policies opposed by investors. Given that States typically must share arbitration costs even when they win a case and must pay for their own legal defense, and that tribunals determine the duration of each stage of the process (and thus how many hours of arbitration fees will be generated), the mere filing of case, even one which is likely to fail on the merits, can dramatically alter the balance of considerations for a government under pressure by an investor to alter a policy. To counter this, a TPP country must be able to raise a general exception without waiting for the lengthy process to ultimately arrive at the merits phase. This could be achieved by adding language to the standard U.S. “Conduct of the Arbitration” provision found in FTAs starting with the Central America Free Trade Agreement (CAFTA) which requires tribunals to consider specific preliminary challenge raised by a Respondent.³⁰ For instance, language (in italics) to the effect of the following could be added to the existing CAFTA text (not in italics):

Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question:

- a) Any objection by the Respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the Claimant may be made under Article 10.26; and
- b) *The Respondent's claim that the measures in question are defensible under [Article XT - the general exception]. In deciding an objection under this paragraph, the tribunal shall require the Claimant to demonstrate that the Respondent's measure does not meet the terms of [Article XT – the general exception].*

ENDNOTES

¹ 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.

² WTO member countries have invoked the Article XX defense in 43 cases and the GATS Article XIV defense is one case, each with distinct "DS" numbers. However several of the GATT Article XX cases were consolidated, with one ruling issued on claims brought by two or three Claimants.

³ These are DS26 and DS48 European Communities — Measures Concerning Meat and Meat Products (Hormones); DS291 and DS292 and DS293 European Communities — Measures Affecting the Approval and Marketing of Biotech Products; DS337 European Communities — Anti-Dumping Measure on Farmed Salmon from Norway; DS384 and DS386 United States — Certain Country of Origin Labelling Requirements; DS392 United States — Certain Measures Affecting Imports of Poultry from China; DS406 United States — Measures Affecting the Production and Sale of Clove Cigarettes; and DS447 United States — Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina.

⁴ Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R, 2 September 2011, at para. 7.297.

⁵ Panel Report, US – Clove Cigarettes, at para. 7.307.

⁶ Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, 4 April 2012, at para. 3.

⁷ These are DS246 European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries, DS371 Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, and DS431 and DS432 and DS433 China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum. 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.

⁸ Panel Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, 1 December 2003, at para. 7.180.

⁹ Panel Report, EC – Tariff Preferences, at para. 7.210.

¹⁰ 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.

¹¹ These are DS31 Canada — Certain Measures Concerning Periodicals; DS161 and DS169 Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef; DS174 and DS290 European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs; 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; DS308 Mexico — Tax Measures on Soft Drinks and Other Beverages; DS339 and DS340 and DS342 China — Measures Affecting Imports of Automobile Parts; DS343 United States — Measures Relating to Shrimp from Thailand; DS345 United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties; 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, DS395 and DS398 China — Measures Related to the Exportation of Various Raw Materials. The exception failed in all of these cases due the "necessary" requirement, except for DSC394, DSC395 and DSC396, where the exception failed due to the "related to" requirement.

¹² Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 3 December 2007, at paras. 210-211. The Appellate Body applied a weighing and balancing test that took into consideration whether less trade restrictive measures were “reasonably available.” “[I]n order to determine whether a measure is ‘necessary’ . . . a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, the result must be confirmed by comparing the measure with possible alternatives, which may be less restrictive while providing an equivalent contribution to the achievement of the objective” (at para. 156). “**...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] Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives. . . . Whereas the Import Ban is a preventive non-generation measure, most of the proposed alternatives are waste management and disposal measures that are remedial in character. . . . The Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives” (at paras. 210-211).

¹³ These are DS2 and DS4 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; DS332 Brazil — Measures Affecting Imports of Retreaded Tyres; DS381 United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products; and DS400 and DS401 European Communities — Measures Prohibiting the Importation and Marketing of Seal Products. Four of these eight cases passed the qualifier threshold on the basis of the “necessary” requirement (DS155, DS332, DS400 and DS401), while four passed on the easier “related to” requirement (DS2, DS4, DS58 and DS381). EC-Asbestos also passed the “necessary” requirement. A total of 15 cases invoking the GATT general exception failed the “necessary” requirement (see endnote 11) of the 20 that faced it – a 75 percent failure rate.

¹⁴ Panel Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/R, 12 June 2007, at para. 4.9.

¹⁵ Panel Report, Brazil – Retreaded Tyres, at para. 4.11.

¹⁶ Panel Report, Brazil – Retreaded Tyres, at para. 7.102.

¹⁷ Panel Report, Brazil – Retreaded Tyres, at para. 7.210.

¹⁸ Panel Report, Brazil – Retreaded Tyres, at para. 7.215.

¹⁹ Panel Report, Brazil – Retreaded Tyres, at para. 7.356.

²⁰ Appellate Body Report, Brazil – Retreaded Tyres, at para. 258(b).

²¹ Appellate Body Report, Brazil – Retreaded Tyres, at para. 228.

²² 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.

²³ Panel Report, US – Gambling, at para. 3.275.

²⁴ Panel Report, US – Gambling, paras. 6.533-6.535 and 6.564-6.565.

²⁵ Panel Report, US – Gambling, at para. 6.566.

²⁶ Panel Report, US – Gambling, at para. 6.607.

²⁷ 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.

²⁸ Annie Lowrey, “Caribbean Nation Gets an International Go-Ahead to Break U.S. Copyright Laws,” *New York Times*, January 28, 2013.

²⁹ See, for example, U.S.-Peru Trade Promotion Agreement, U.S.-Peru, Article 22.2, Apr. 12, 2006. “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.”

³⁰ See Dominican Republic-Central America Free Trade Agreement, U.S.-Dom. Rep.-Cent. Am., Article 10.20.4, Aug. 5, 2004.