General Exceptions of Article XX of the GATT 1994 and Article XIV of the GATS

Juan Ochoa, Postdoctoral Research Fellow
31.10.12
Parts of the Lecture
1. Approach of customary international law to defenses
2. ‘General exceptions’ of Art. XX of the GATT 1994
3. ‘General exceptions’ of Art. XIV of GATS

1. Approach of customary international law to defenses
2001 ILC Draft on State Responsibility:
• It calls defenses ‘circumstances precluding wrongfulness’
• Purpose: provide a shield against an otherwise well-founded claim for the breach of an int’l obligation
• Art. 55 of Draft Articles:
  – The Rules in the Draft apply, unless and “to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”
2. **A variety of exceptions to WTO rules**

- ‘general exceptions’ of Art. XX of the GATT 1994 and Art. XIV of the GATS;
- ‘security exceptions’ of Art. XXI of the GATT 1994 and Art. XIV \textit{bis} of the GATs;
- ‘economic emergency exceptions’ of Art. XIX of the GATT 1994 and the Agreement on Safeguards;
- ‘regional integration exceptions’ of Art. XXIV of the GATT 1994 and Art. V of the GATS;
- ‘balance of payments exceptions’ of Arts. XII and XVIII:B of the GATT 1994 and Art. 1994 and Art. XII of the GATS; and

These exceptions differ in scope and nature.
Focus of the lecture: ‘general exceptions’ of Art. XX of the GATT 1994 and Art. XIV of GATS

Nature and function of these Articles
• Allow Members to adopt and maintain measures that promote or protect other societal values and interests, even though this legislation or these measures are inconsistent with substantive disciplines imposed by the GATT 1994 or the GATS.

When Art. XX exceptions should be considered?
• Only when a measure of that Member has been found to be inconsistent with another GATT provision (GATT Panel Report, US - Section 337, para. 5.9)
Do Art. XX of GATT and Art. XIV of GATS constitute *lex specialis* vis-à-vis the rules on defenses/CPW under CIL?

Test under Art. XX of the GATT 1994 for determining whether a measure, otherwise inconsistent with GATT obligations, can be justified

- It is two-tier; fulfillment of:
  - Requirements of one of the exceptions listed in paras. (a) to (j) of Art. XX; **include two elements**
    - substantive scope,
    - relationship between measure and aim
  - Requirements of the introductory clause (the ‘chapeau’)

The analysis needs to be done in this order (**AB Report, US – Shrimp, 12 Oct. 1998**)
Specific Exceptions under Article XX of the GATT 1994

1. Art. XX(b): ‘measures necessary to protect human, animal or plant life or health’
   • Two-tier test to determine whether a measure is provisionally justified under this provision:
     • The measure is designed to protect life or health of humans, animals or plants
     • The measure is ‘necessary’ to fulfill that policy objective

Factors to assess the second requirement
   • Extent to which the measure ‘contributes to realization of the end pursued”
     Concerns the relationship between the measure at stake and the legitimate policy objective pursued
   • Importance of the societal value pursued by the measure at issue.
     • In addition to the general objective – e.g. human health, one should look at the specific societal value pursued – e.g. human life
Factors to assess the ‘necessity’ requirement (continued)

- The restrictive impact of the measure on imports or exports
  These factors will analysed further

- If its preliminary concluded that the measure is necessary, it must be confirmed by comparing it with its possible alternatives. Factors to assess the latter:
  - Alternative must be less trade-restrictive than the measure at issue.
  - Alternative must allow the Member “to achieve its desired level of protection with respect to the policy objective pursued” (AB, Brazil – Retreaded Tyres, paras. 156 and 170)
  - Implementation should be as demanding as the measure at issue.
    - in assessing whether alternative measures are ‘reasonably available’, “the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies’ may be relevant” Brazil – Retreaded Tyres, AB, para. 171).
Art. XX(d): ‘measures necessary to secure compliance with …’

- Two-tier test to determine whether a measure is provisionally justified under this provision:
  - Measure must be designed to secure compliance with laws or regulations which, in themselves, are not GATT-inconsistent (i.e. WTO-compatible laws and regulations)
  - The term ‘laws or regulations’ covers only domestic ones. It does not include obligations of another WTO member under an int’l agreement.” (*Mexico – Taxes on Soft Drinks*, AB)
  - The ‘the laws or regulations’ referred to in Art. XX(d) have to be GATT-consistent.
  - Examples: customs law or intellectual property law,
    - Measure must be necessary to ensure such compliance
Art. XX(g): ‘measures relating to the conservation of exhaustible natural resources …’

- Concerns measures taken for environmental protection purposes.
- It sets out a two-tier test, requiring that a measure:
  - Relate to the conservation of exhaustible natural resources;
    - Meaning of the concept of ‘exhaustible natural resources’
    - This concept **covers both living and non-living resources** *(US – Shrimp, AB, para. 131)*.
    - To do so, it adopted a broad, ‘evolutionary interpretation of this concept.

- Which arguments did the AB use?
- In the light of WTO case-law, how could one identify the boundaries of ‘exhaustible natural resources’?
Requirements for measures under Art. XX(g) (continued):

- Measure must be a measure ‘relating to’ the conservation of exhaustible natural resources.
- Be ‘made effective in conjunction with’ restrictions on domestic production or consumption.
  - Requires that imported and domestic products are treated in an ‘even-handed’ manner; it does not require that they are treated equally *(US – Gasoline, AB, at 19, 21).*
  - In *China - Raw Materials*, Panel stated:
    - Para. 7.398 and 7.455: Export restrictions and the related domestic restrictions must operate at the same time.
    - Requirement of even-handedness
      - **The Panel kept the ambiguity re. this requirement:** Para. 7.465: In order to show even-handedness, China would need to show that the impact of the export duty or export quota on foreign users is somehow balanced with some measure imposing restrictions on domestic users and consumers.
Which is the relation between Article XX(g) and Article XX(i) according to the Panel in *China - Raw Materials*?
China - Raw Materials, Para. 7.386: Article XX(g) … cannot be interpreted in such a way as to contradict the provisions of Article XX(i).

- In other words, WTO Members cannot rely on Article XX(g) to excuse export restrictions adopted in aid of economic development if they operate to increase protection of the domestic industry.

What do you think about this interpretation of the Panel?
Art. XX(a): measures ‘necessary to protect public morals’

• As of 2011, there is no WTO case law on this para.
• Frequently invoked by Members to impose import bans or restrictions on a wide array of products.
• Relevant case under GATS: U.S. – Gambling

• Applicable test to assess whether a measure is justified under this Article:
  – The concept of public morals
    • Analysed below when examining the correspondent GATS provision.
  – The measure must be ‘necessary’ to protect the public morals
Other paras. of Art. XX of GATT

- Art. XX(f) concerns measures ‘imposed for’ the protection of national treasures of artistic, historic, or archeological value.

- Art. XX(e) concerns measures ‘relating to’ the products of prison labour.
**Relationship between the measure at stake and the legitimate policy objective pursued**

Article XX of GAT and Art. XIV of GATS use, under the various grounds for exceptions, different expressions to refer to the type of relationship required.

<table>
<thead>
<tr>
<th>Expression used to denote the relationship</th>
<th>GATT</th>
<th>GATS</th>
</tr>
</thead>
<tbody>
<tr>
<td>“necessary to”</td>
<td>Art. XX(a)</td>
<td>Art. XIV (a)</td>
</tr>
<tr>
<td></td>
<td>Art. XX (b)</td>
<td>Art. XIV (b)</td>
</tr>
<tr>
<td></td>
<td>Art. XX (d)</td>
<td>Art. XIV (c)</td>
</tr>
<tr>
<td>“relating to”</td>
<td>Art. XX (g)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Art. XX (e)</td>
<td></td>
</tr>
<tr>
<td>“imposed for”</td>
<td>Art. XX(f)</td>
<td></td>
</tr>
<tr>
<td>“in pursuance of”</td>
<td>Art. XX (h)</td>
<td></td>
</tr>
<tr>
<td>“essential to”</td>
<td>Art. XX (j)</td>
<td></td>
</tr>
</tbody>
</table>
The use of different expressions – which according to their wording appear to have different meanings - would suggest different kinds of relationships required.

- Have Panels and the AB given these expressions considerably different meanings?

‘Necessity’ requirement:

- Factors to assess compliance with this requirement are the same under the various provisions of Art. XX of GATT and Art. XIV of GATS
  - The extent to which the measure ‘contributes to realization of the end pursued”
  - The importance of the societal value pursued by the measure at issue.
  - The restrictive impact of the measure on imports or exports

Which of these is the key factor?
Variety of Approaches to factor No. 1 in WTO case law (listed from newest to oldest):

- **China - Raw Materials**, Panel, para. 7.511): Member must show how the adopted measures fulfill the objective it claims to address (under Art. XX(d) of GATT)

- Relationship required would vary according to level of the trade restrictiveness of the measure, which is another element of the ‘necessity test’:
  - When a measure produces restrictive effects on int’l trade as severe as those resulting from an import ban, the measure must be apt to make a material contribution to the achievement of its objective (Brazil – Retreaded Tyres, para. 150).

- **Korea – Various Measures on Beef**, AB: under Art. XX(d) of GATT the word ‘necessary’ is not limited to that which is ‘indispensble’ or ‘of absolute necessity’.

- **Mexico – Taxes on Soft Drinks**, AB, para. 74, : it suffices under Art. XX(d) that the measure contribute to securing compliance with laws or regulations …. It is not required that the measure guarantees that it achieves its result with absolute certainty
Additional element to assess this factor:

• The level of protection of the policy objective pursued by the regulating State
  – In *EC- Asbestos*, para. 68, AB: it is for WTO members to determine the level of protection of health or the environment they consider appropriate in a given situation (AB Report, Brazil – Retreaded Tyres, paras. 140 and 210)
‘relating to’ requirement

- Ex. Art. XX(g): The measure must be a measure ‘relating to’ the conservation of exhaustible natural resources.
- Trend towards making this requirement more stringent (listed from oldest to newest)
  - GATT Panel Herring and Salmon - Canada: the test is whether the measure is primarily aimed at the conservation of an exhaustible natural resource?
  - In US – Gasoline, at 17, the AB stated that Art. XX(g) requires that the measure must be reasonably related to the end pursued, i.e. the conservation of an exhaustible natural resource.
  - AB, US – Shrimp, 12 Oct. 1998, para. 141: Found that the “means used (were) reasonably related to the ends. The relationship was “a close and real one”.
  - In China - Raw Materials, the Panel
    - Reaffirmed the AB statements on this element in US – Gasoline and US – Shrimp.
• Other expressions used in Art. XX of less importance nowadays

Preliminary conclusion on the approach of the Panels and the AB to the relationship required btw. the measure and the legitimate policy pursued:
– A trend to make these requirements more stringent and even to bring them closer.

The requirements of the introductory clause (the ‘chapeau’)
Scope of the chapeau:
• addresses the manner in which the questioned measured is applied, not to the measure or its specific content as such. (AB, US – Gasoline, at 20-1; and Brazil - Retreaded Tyres, para. 215).

Object and Purpose of the chapeau:
• AB, US – Shrimp, para. 157: avoid that provisionally justified measures are applied in such a way as would constitute a misuse or an abuse of the exceptions of Article XX.
• Ultimately, seeks to protect the rights of other Members (Id. para. 159).
• Expression of the principle of good faith (AB, US - Shrimp, para. 158; Brazil – Retreaded Tyres, para. 224)
Test set out by the chapeau:
The application of the trade-restrictive measure may not constitute:
• Either (i) ‘arbitrary’ or (ii) ‘unjustifiable’ discrimination btw. countries where the same conditions prevail’;
  – Elements:
    1. The application must result in discrimination
       – Chapeau covers both de jure and de facto discrimination (AB, US – Shrimp, para. 160).
    2. The discrimination must be ‘arbitrary or unjustifiable’ in character.
       – “(Unjustifiable) discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries (AB, US – Shrimp, paras. 150 and 165)
An abuse of the Art. XX exceptions exists, contrary to purpose of the chapeau, when the reasons given for the discrimination/distinction ‘bear not rational connection to the objective falling within the purview of a para. XX, or would go against that objective” (AB, Brazil – Retreaded Tyres, para. 227).

• ‘arbitrary’ discrimination (AD)
  – Rigidity and inflexibility may constitute AD.

3. ‘a disguised restriction on int’l trade.’
  – In Japan – Alcoholic Beverages, the AB suggested that the protective application of a measure can most often be discerned form its design, architecture and revealing structure.
According to the case-law of WTO Panels and the AB, can unilateral measures pursuing one of the objectives set in Article XX of GATT be justified under this Article?

- If the answer is in the affirmative, which requirements should these measures meet in order to be so?

Is a jurisdiction link required between the regulating State and the subject of regulation under Article XX of GATT and Article XIV of GATS?

‘General exceptions’ of Art. XIV of GATS

- In *US- Gambling*, the AB stated that decisions under XX of the GATT are relevant for the analysis under Art. XIV of GATS
Test under Art. XIV of the GATS for determining whether a measure, otherwise inconsistent with GATS obligations, can be justified

• Two-tier: Fulfillment of:
  – Requirements of one of the exceptions under paras. (a) to (e) of Art. XIV; and
  – Requirements of the introductory clause (the ‘chapeau’)

Requirements of one of the exceptions under paras. (a) to (e) of Art. XIV

Additional to those in the GATT:

• Maintenance of public order;
• Protection of privacy of individuals;
• Protection of safety; and
• Equitable or effective imposition or collection of direct taxes.
Art. XIV (a): ‘measures necessary to protect public morals or to maintain public order’

Two-tier test:

• Policy objective pursued by the measure at issue: *protection of public morals or the maintenance of public order*;
  
  – Members should be given “some scope to define and apply (these) concepts according to their own systems and scales of values” (Panel in *US – Gambling*, para. 6.461)
  
  – Measure must be aimed at protecting the interests of the people within a community or a nation as a whole (Panel in *US – Gambling*, para. 6.463).
  
  – Term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation ….” (Panel in *US – Gambling*, para. 6.465).
  
  – Footnote 5 to Art. XIV(a) of GATS: ‘public order’ exception “may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”
Whether the measure is “necessary to protect public morals or to maintain public order” (Art. XIV (a))

- In US – *Gambling*, paras. 306-307, AB identified the same factors as those used under Art. XX (b) and (d) of GATT.

Art. XIV (c): ‘measures necessary to secure compliance with …”

Three-tier test:

- Measure must be designed to secure compliance with national laws or regulations

  Laws and regulations covered include those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
  - (ii) the protection of the privacy of individuals;
  - (iii) safety.
• Those national laws and regulations are not inconsistent with the WTO Agreement
  – According to the Panel in US – Gambling the case law on Art. XX(d) of GATT is relevant for the interpretation and application of the first two elements of the test under Art. XIV(c) of GATS.
• The measure must be necessary to ensure such compliance.

Art. XIV (d): ‘inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;’
• Limited scope: only justifies inconsistency with the national treatment obligation of Art. XVII of GATS.
• Footnote 6 to this article contains a non-exhaustive list of measures that are aimed at ensuring the equitable or effective imposition of collection of direct taxes
Art. XIV (e): ‘inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.’

- Limited scope: only justifies inconsistency with the MFN treatment obligation of Art. II of GATS

Chapeau of Art. XIV of GATS:

- Text quite similar to that of the chapeau of Art. XX of GATT 1994.
- Therefore, case law on the latter is relevant to analyse the elements of the former.
How is the burden of proof divided among the regulating State (‘the defendant’) and the complaining State in the context of disputes involving the exceptions under Article XX of GATS and Article XIV of GATS?

Conclusions

Thank you!