



UiO • **PluriCourts** – The Legitimacy of the International Judiciary
University of Oslo

General Exceptions Under the GATT 1994

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**PLURI
COURTS**

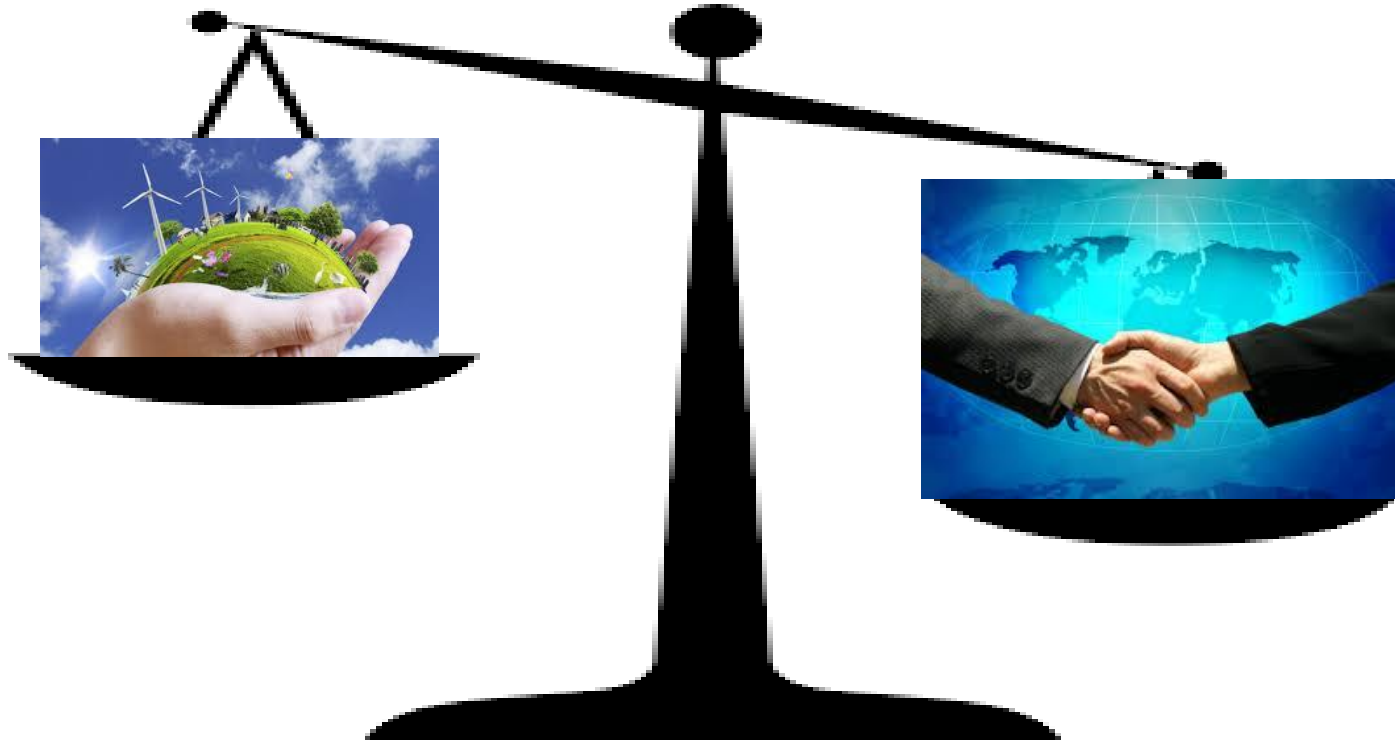
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OVERVIEW

- I. **GENERAL CONTEXT**
- II. **SCOPE AND NATURE OF Art. XX**
- III. **THE ‘TWO-TIER’ TEST**
- IV. **SPECIFIC EXCEPTIONS**
- V. **THE CHAPEAU**
- VI. **STUDENT PRESENTATION**

I. GENERAL CONTEXT



II. SCOPE AND NATURE OF ART. XX

How to ask the questions properly?

1) Is there an *inconsistency* between the State measure and a GATT provision (NT, MFN, QR, etc.)?

IF YES!!

2) Can it be *justified* under art. XX GATT?

II. SCOPE AND NATURE OF ART. XX

- **Limited** – exhaustive list of exceptions
- **Conditional** – the conditions of art. XX must be met
- Allows deviations from **all** GATT obligations
- **Balance** between the rights of State 1 under GATT *and* the legitimate policy objectives of State 2
- Covers also unilateral measures – *US Shrimp 1998*

Does art. XX apply to other WTO Agreements?

- Ammmm... mostly **NOT** ‘[...] nothing in *this* Agreement [...]’

BUT

- *China Publ. Audiovisual Products* – art. 5.1. AP – **YES** – reference to **regulation of trade**
- *China Raw Materials* – art.11.3 AP – **NO**
- If GATT XX **incorporated** into other WTO agreement – art. 3 TRIMS - **YES**

II. TWO-TIER TEST

US-Gasoline (1996) – para. 139

- **Step 1** – Does the measure fall under a *specific exception*?

IF YES

- **Step 2** – Are the requirements of the *chapeau* met?

US Shrimp (1998) – para. 119 - **analysis must be conducted in this order!!**

III. THE SPECIFIC EXCEPTIONS

- Art. XX (b),(d) and (g) more widely used
- *EC-Seal Products (2014)* para. 5.169 – method
 - (a) Is the measure *designed to* address the specific interest?
 - AND**
 - (b) Is there a *nexus* between the measure and the interest?

Art. XX(b) protection of humans/plants/animals

- (a) Designed to protect ...
- (b) 'Necessary to'

(a) **Designed to protect ...**

- Covers public health + environment
- Design, structure, purpose of the measure
- *Brazil Retreaded Tyres (2007)*– part of comprehensive program
- Deference to state

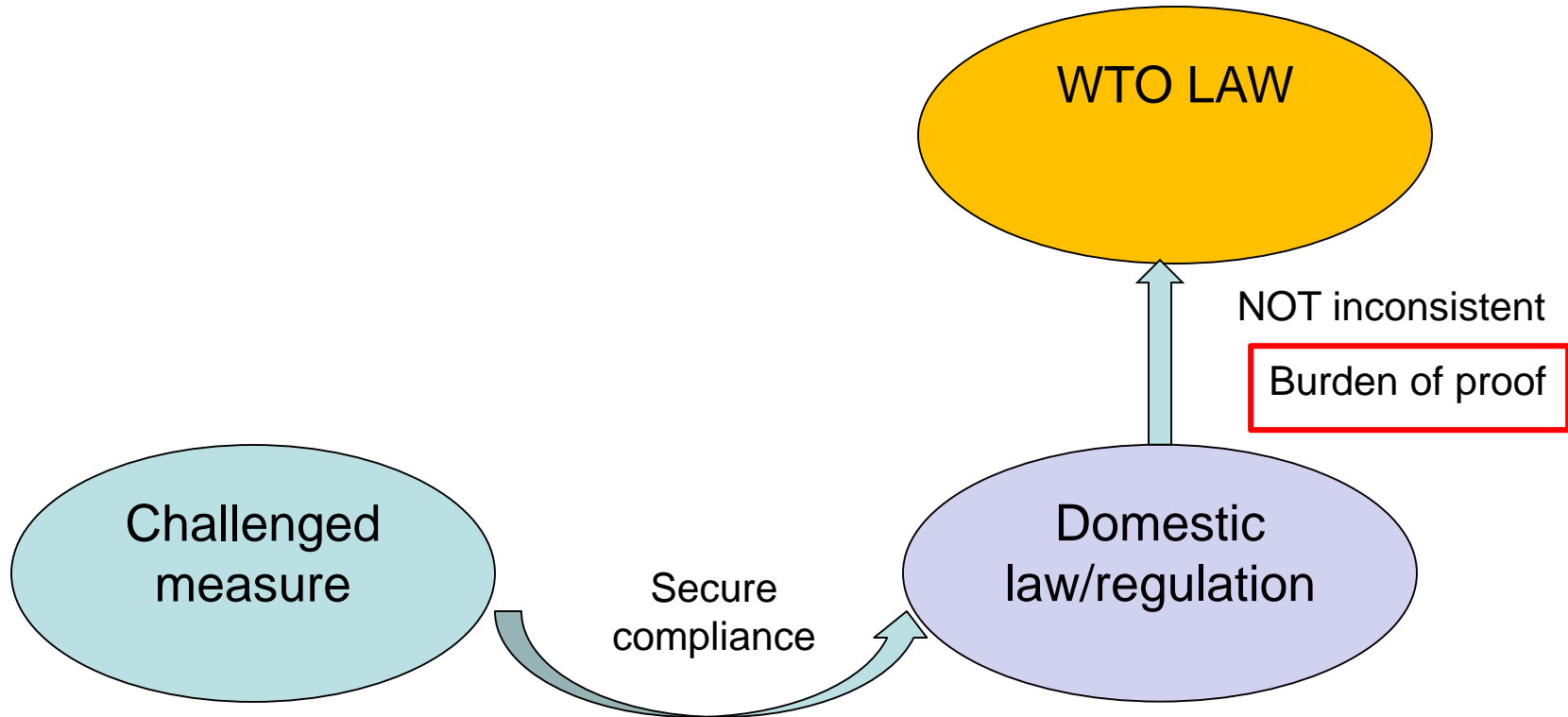
Art. XX(d) Secure Compliance with Domestic Laws NOT inconsistent with WTO Law

- (a) Designed to secure compliance...
- (b) 'Necessary to'

(a) Designed to secure compliance...

- *Korea Beef 2001*
- **secure compliance** – measure is a means to 'enforce' domestic rule; *incapable* of securing compliance?
- **domestic laws/regulations** – case-by-case analysis

Art. XX(d) Secure Compliance with Domestic Laws NOT inconsistent with WTO Law



‘Necessary to’!!

- Applies to art. XX (a), (b), (d) + art. XIV GATS
- Complex and fairly controversial
- Current approach first applied in *Korea Beef (2001)* then reconfirmed in *Brazil Retreaded Tyres (2007)*, paras. 143-183, 210

‘Necessary to’!!

Step 1 – What is the relative **importance** of the protected value?

Step 2 – **Factors**: contribution to objective, trade restrictiveness

Step 3 – Are there **possible alternatives** to the measure?



Weighing and balancing of relevant factors

Art. XX(g) Conservation of Exhaustible Natural Resources

- (a) Conservation of exhaustible natural resources
- (b) ‘relating to’
- (c) Made effective in conjunction with restrictions on domestic production/consumption

(a) Conservation of exhaustible natural resources

- **Conservation:** preservation + regulation – *China Rare Earths*
- **Balance:** trade lib. + sovereignty + sustainable development
- **Exhaustible:** both living and non-living! – *US Shrimp*, para. 128

(b) ‘relating to’

- relationship between measure and objective, *US Shrimp* para. 135
- reasonable to achieve objective?
- design, structure of the measure

(c) Made effective in conjunction with restrictions on domestic production/consumption

- even-handedness – *US Gasoline*, p 20
- measure applies to local + imported products
- Identical treatment **not** required

IV. THE ‘CHAPEAU’

- Second step in the overall test
- Concerns the actual **application** of the measure
- Meant to **prevent abusive use** of exceptions
- Emanation of principle of **good faith** – *Brazil RT*, para. 224
- **Line of equilibrium** between competing rights of Members

IV. THE ‘CHAPEAU’

3 separate but interrelated parts:

- arbitrary discrimination

OR



- unjustifiable discrimination

OR

- disguised restriction on international trade

between countries where
the same conditions
prevail

Arbitrary/unjustifiable discrimination

Step 1 – Is there discrimination?

Does the same measure apply to countries where different conditions prevail?

Step 2 – Was it applied in an arbitrary/unjustifiable way?

Case-by-case analysis *US Shrimp, Brazil R Tyres*

Did it have a legitimate cause or rationale?

Was it avoidable? Was a multilateral solution sought?

Step 3 – Did the same conditions prevail in the countries?