

## *CHAPTER 4*

# JUSTIFIABLE REASONS

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## OVERVIEW OF RULES

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### ***1. OVERVIEW OF RULES***

#### **(1) OUTLINE**

As described in “Overview of the WTO Agreements” of Part II, the WTO Agreements provide most-favored-nation treatment, national treatment, prohibition of tariff imposition exceeding bound tariff rates, and prohibition of quantitative restrictions as the basic principles for developing/maintaining the multilateral trade system. Although the WTO Agreements aim to maintain/develop the free-trading system<sup>1</sup>, they do not restrain implementation of legitimate domestic policies of member countries.<sup>2</sup>

However, accepting policies based on the rights of member countries to regulate without any limitation may result in abuse of protectionist measures that are taken under the pretext of policy objectives such as resource conservation or environmental protection. Therefore, in order to prevent abuse of the rights of member countries to regulate, the WTO Agreements contain provisions that coordinate the principles of trade liberalization with such rights. GATT Articles XX (General Exceptions) and XXI (Security Exceptions) are representative examples of such provisions, and they are collectively referred to as “justifiable reasons” in this Chapter.

#### **(2) KEY POINTS TO INTERPRETATION OF PRECEDENTS**

GATT Article XX consists of subparagraphs (a) to (j) that list the policies that may be deemed justifiable reasons, such as protection of human health, and also contains the chapeau (a clause requiring that these objectives should not be abused or used to restrict international trade in an unjustifiable manner) (see 2) (1) (a)).

As described below, justifiable reasons based on GATT Article XX have been the main points at issue in many WTO dispute settlement procedures, and there is an accumulation of precedents available. Key points regarding interpretation in the precedents are as follows:

First, decisions focus on the relationships between policy objectives and measures, and the appropriateness of the methods used. Necessary criteria of subparagraphs (a), (b) and (d), the relationship criteria of subparagraph (g), and the chapeau of GATT Article XX are examined from the view point of whether or not the measures of concern can reasonably be explained by the policy objectives, or whether more desirable measures exist.

Second, justifiable reasons are examined in the context of the content of the measures, and the existence of actual impacts on trade is not considered (see also 2. “Basic Viewpoint of the Report” of Preface). While on the competitive relationships between imported products and domestic products are

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<sup>1</sup> See the Preamble of the Agreement Establishing the WTO.

<sup>2</sup> For example, measures taken by the customs at borders to control intellectual property rights infringing products for the purpose of securing the prohibition of distribution/sales of intellectual property rights infringing products within the country (see the Customs Law).

given importance in examining justifiable reasons, changes in trade volumes also depend on various other factors, and thus it is not appropriate for them to be included in assessment of competitive relationships.

Third, precedents where a defense based on justifiable reasons were approved are quite limited (see Figures II-4-3, II-4-5, II-4-6, II-4-7, and II-4-8). This means that, at least most precedents, the policy objectives the respective countries raised as a basis for justification are determined to be inconsistent with the WTO Agreements. Therefore, if Japanese industries are faced with trade-restrictive measures of foreign governments and the governments justify the measures by raising some policy objectives, the measures are likely to be determined inconsistent with the WTO Agreements in light of the precedents.

## **2. LEGAL FRAMEWORK**

### **(1) GENERAL EXCEPTIONS (GATT ARTICLE XX AND GATS ARTICLE XIV)**

#### ***(a) Functions and Structure of the Articles***

GATT Article XX exempts measures from being considered WTO violations based on various domestic policy goals, including protection of public morals (subparagraph (a)), protection of human, animal or plant life or health (subparagraph (b)), customs enforcement/cross-border regulations (subparagraph (d)), and conservation of exhaustible natural resources (subparagraph (g)), etc. GATT Article XX applies to every article of GATT and has the function of coordinating the rights of member countries to regulate with the trade liberalization benefits of other member countries. GATS Article XIV, which controls trade in services, has provisions similar to GATT Article XX. Since they are almost identical and only a few precedents relating to GATS Article XIV exist, GATT Article XX is mainly described in this Chapter.

GATT Article XX consists of subparagraphs (a) to (j) that list the policies that may be deemed justifiable reasons for exempting a measure from being considered a GATT violation, such as protection of human health. The chapeau of Article XX requires that these objectives not be abused and used to restrict international trade in an unjustifiable manner (see Figure II-4-1).

As described below, the significance of the respective subparagraphs is to list the 10 types of policies subject to justification, and the significance of the chapeau is to prevent abuse of justifiable reasons. Additionally, measures are examined as such in the relevant subparagraph, in others the “ways of applying measures” are examined in the chapeau.<sup>3</sup> This difference is important in actual practice because it has considerable effect on methods of implementing the decisions of the WTO dispute settlement procedures. That is, for measures that are determined to violate GATT due to a failure to meet the requirements in the respective subparagraphs, the implementing country is required to revise the measures. In contrast, for measures that fail to meet the requirements in the chapeau, the implementing country does not need to revise the measures, but is only required to reconsider how to apply them. The order of examining GATT Article XX has been confirmed in precedent -- the respective subparagraphs are examined first and then the chapeau.<sup>4</sup>

The burden of proof under GATT Article XX is, in principle, on the member countries that introduced the measures of concern (respondent countries in the WTO dispute settlement proceedings (hereinafter referred to as “respondent countries”).<sup>5</sup> The reason for this is that respondent countries

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<sup>3</sup> US – Shrimp (DS58), Appellate Body Report, para. 119

<sup>4</sup> US – Gasoline (DS2), Appellate Body Report, ps. 22

<sup>5</sup> US – Gasoline (DS2), pp. 22-23

are the parties that benefit from the claimed exception.

For measures that are recognized as violating any GATT Articles to be accepted as providing justifiable reasons based on GATT Article XX, respondent countries need to claim/prove that the measures [1] are policies that fall within one of the subparagraphs of GATT Article XX and [2] do not violate one of the application methods of the chapeau. In contrast, complainant countries in WTO dispute settlement proceedings (hereinafter referred to as “complainant countries”) need to claim as a counterargument to respondent countries that the measures [1] do not constitute any if the policy types set out in Article XX and/or [2] fail to fulfill one or more of the application methods set out in the chapeau (see Figure II-4-2).

The concrete contents of the Article and previous precedent cases are described below in the order of the respective subparagraphs and the chapeau. (See Chapter 2, Part II for the relationship between GATT Articles III and XXX.)

**Figure II-4-1 Content of GATT Article XX**

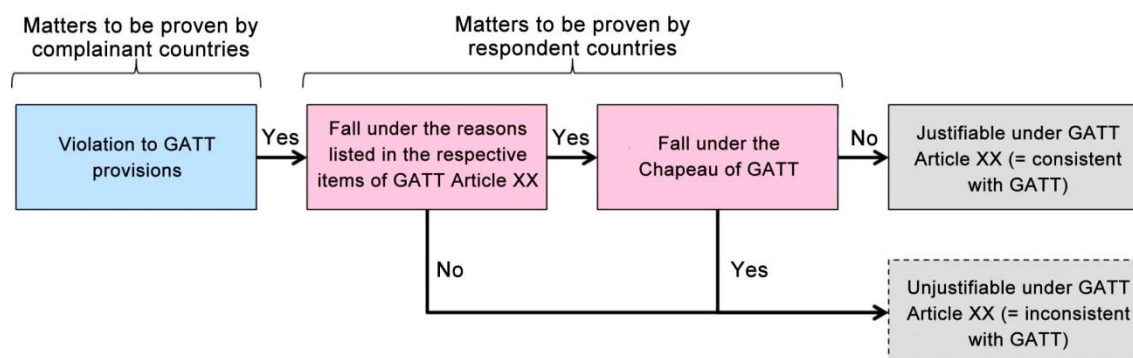
<Respective subparagraphs>

- (a) Measures necessary to protect public morals
- (b) Measures necessary to protect human, animal or plant life or health
- (c) Measures relating to the importations or exportations of gold or silver
- (d) Measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT
- (e) Measures relating to the products of prison labour
- (f) Measures imposed for the protection of national treasures of artistic, historic or archaeological value
- (g) Measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption
- (h) Measures undertaken in pursuance of obligations under any intergovernmental commodity agreement
- (i) Measures involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan
- (j) Measures essential to the acquisition or distribution of products in general or local short supply

<Chapeau>

- (1) Application in a manner which would constitute a means of arbitrary<sup>6</sup> or unjustifiable discrimination between countries where the same conditions prevail
- (2) Application in a manner which would constitute a disguised restriction on international trade

<sup>6</sup> See notes on GATS Article XIV.

**Figure II-4-2 Framework for Interpreting GATT Article XX****(b) Subparagraphs of GATT Article XX****i. Protection of public morals (subparagraph (a))****Structure of the article and precedents**

Subparagraph (a) justifies “measures necessary to protect public morals”. Typically, measures that prohibit import of narcotics or obscene materials for religious/ethical reasons, etc. fall within this subparagraph. For example, import and export of pork and alcoholic beverages, etc. are prohibited in Islamic countries based on subparagraph (a).<sup>7</sup>

Meeting the requirements of subparagraph (a) requires that [1] the policy objective of the measure is to “protect public morals” and [2] the measure is “necessary” for achieving the policy objective.

Subparagraph (a) of GATS Article XIV has a provision that is similar to this subparagraph.

See Figure II-4-3 for the precedents relating to subparagraph (a).

**Figure II-4-3 Precedents Relating to Subparagraph (a) of GATT Article XX**

Case No. and Title (Determining Body)	Contents of “Public morals” to protect and the relevant measure	Stage	Agreement Interpretation (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience					
			Violated Provision	(a) [1] (Policy objective)	(a) [2] (Relation ship)	(a) [3] (Necessity)	Chapeau	Conclusion
DS285: US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Panel/ Appellate Body)	Prevent organized crime by prohibiting cross-border gambling	P	GATS Article XVI	○ (falls under)	×	(does not fall under)	–	Unjustifiable
		AB		○ (falls under)	○ (falls under)	×	(falls under)	Unjustifiable
DS363: China Measures Affecting Trading Rights and Distribution	Prevent harmful expressions by censorship of publications, etc.	P	Article 5.1 of the WTO	○ (falls under)	×	(not fall under)	–	Unjustifiable
		AB	Accession Protocol of China	○ (falls under)	×	(not fall under)	–	Unjustifiable

<sup>7</sup> Import and export of Koran, alcoholic beverages, pork and gambling machines are prohibited in Saudi Arabia (WTO Accession Working Party report WT/ACC/SAU/61 Annex F), and import and export of publications that outrage national religious feelings or contain violent/obscene expressions are prohibited in Bangladesh (WT/TPR/S/168, ps. 142).

Services for Certain Publications and Audiovisual Entertainment Products (Panel/Appellate Body)								
DS400/401: EC – Measures Prohibiting the Importation and Marketing of Seal Products (Panel/Appellate Body)	Secure animal welfare of seals by designating hunting methods of seals	P	GATT Articles I:1, III:4	○ (falls under)		○ (falls under)	× (falls under)	Unjustifiable
		AB		○ (falls under)		○ (falls under)	× (falls under)	Unjustifiable
DS461: Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (Panel/Appellate Body)	Prevent the illicit import of products at below-threshold prices, which is used for money laundering, by imposing customs duties on a compound basis.	P	GATT Article 2.1(a) and (b)	○ (falls under)	× (not fall under)	× (not fall under)	× (falls under)	Unjustifiable
		AB		○ (falls under)	○ (falls under)	× (not fall under)	-	Unjustifiable
DS477/478 Indonesia – Importation of Horticultural Products, Animals and Animal Products (Panel)	Secure compliance with Halal requirements (prevent deterioration in the Halal status of imported agricultural products due to inappropriate storage and management) by imposing requirements of possessing a warehouse; prevent consumers from misrecognizing Halal products by setting limitations on their uses and distribution.	P	GATT Article XI.1	○ (falls under)	× (not fall under)	× (not fall under)	× (not fall under)	Unjustifiable

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

Policy objectives

According to precedent, public morals are broad concepts that vary in time and place depending on a wide range of factors that include dominant social, cultural, ethical and religious values. In addition, member countries have a certain degree of flexibility to define and apply public morals within their own territory in accordance with their own systems and standards of value.<sup>8</sup> Subparagraph (a) is an important provision for balancing the free-trading system with various religious/ethical/social values, and the role of this subparagraph is expected to increase in the future.

The “prohibition of cross-border gambling (for the purpose of preventing organized crime)” in the case of US – Gambling (DS285) and the “measure that grants the right to import films for theatrical release and publications, etc. only to state-owned enterprises and not to foreign enterprises (for the purpose of censorship)” in the case of “China - Publications and Audiovisual Products” (DS363) involved the issue of whether the measure was covered by the public morals exception. In these cases, complainant countries did not claim that “prohibition of cross-border gambling” or “censorship of publications, etc.” per se did not fall under protection of public morals; rather, they focused on the way in which the measures were applied. This was due to the discretionary nature of the concept of “protection of public morals”.

Necessity of measure

When the measures satisfy the policy objectives of subparagraph (a), the measure is justified only if the measure is “necessary” to achieve the policy objectives. That is, regulations that cannot be explained in light of the policy objectives of the measure cannot be justified. In addition, according to the precedent, as similar wording is used in subparagraphs (a), (b), and (d), the same criteria are used to determine the necessity of the challenged measure.

According to GATT precedent prior to entry into force of the WTO, determining necessity was understood to require “non-existence of alternative measures less inconsistent to the Agreement for achieving the policy objectives”.<sup>9</sup> However, proving such “necessity” is extremely difficult, and there were strong criticisms both in theory and in practice because under these criteria respondent countries were under a heavy burden of proving that “less trade-restrictive alternative measures are not available”.

According to recent precedent, determining necessity is understood as a process of weighing and balancing a series of factors. More concretely, necessity is determined through comprehensively considering the following three factors.<sup>10</sup> [1] importance of the policy objectives of the measures (significance of the advantages), [2] trade-restrictive effect of the measures (significance of the disadvantages), and [3] contribution of the measures to the achievement of the policy objectives (quantitatively or qualitatively demonstrating substantial contribution<sup>11</sup> (there is no prescribed threshold for the level of contribution)).<sup>12</sup> With regard to their mutual relationships, [1] through [3] are individually determined although, according to some precedent, if the level of substantial contribution cannot be determined, the requirement of necessity cannot be deemed to be met. On the other hand, when the trade-restrictive effect is significant, such as in cases of import prohibition, a finding of necessity is highly likely.<sup>13</sup> The existence of necessity is tentatively determined at this point.

When necessity is tentatively determined and complainant countries propose that a “less trade-

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<sup>8</sup> US – Gambling (DS285), Panel Report, para. 6.465

<sup>9</sup> Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes, Report, para. 75

<sup>10</sup> Korea – Various Measures on Beef (DS161), Appellate Body Report, para. 164; Brazil – Retreaded Tires (DS332), Appellate Body Report, paras. 108-119; China – Raw Materials (DS394, 395, 398), Panel Report, paras. 7.478-7.493

<sup>11</sup> Brazil – Retreaded Tires (DS332), Appellate Body Report, para. 151

<sup>12</sup> EC – Seal Products (DS400, 401), Appellate Body Report, para. 5.213

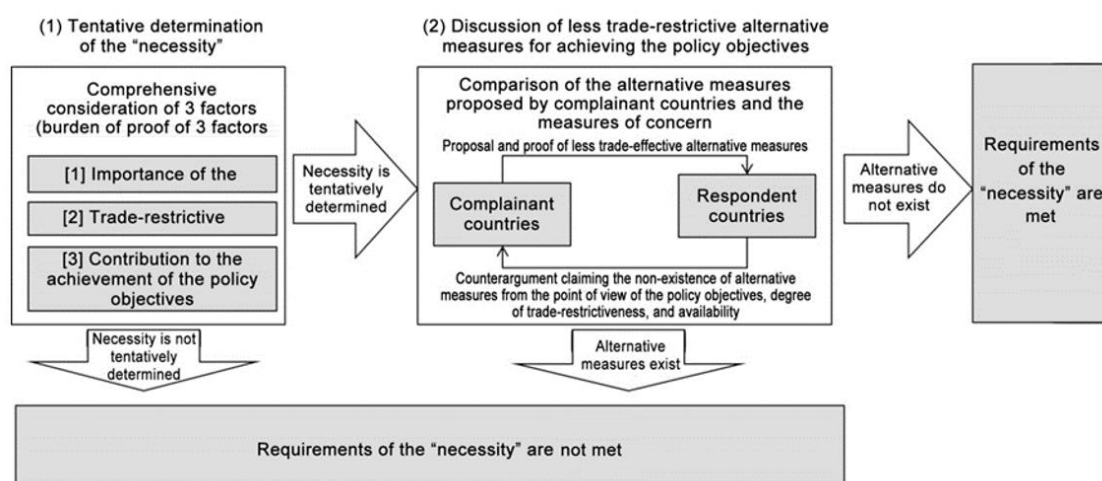
<sup>13</sup> EC – Seal Products (DS400, 401), Appellate Body Report, para. 5.213; Brazil – Retreaded Tires (DS332), Appellate Body Report, para. 150

restrictive alternative measures for achieving the same level of contribution to the measures at issue” exists, the measures of concern are compared with the alternative measures to re-examine the tentatively-determined existence of necessity.<sup>14</sup> Necessity is determined to exist if complainant countries cannot prove the existence of such less trade-restrictive alternative measures; it is denied otherwise. (The alternative measures must be reasonably available, from the point of view of cost and technology, to respondent countries).<sup>15</sup>

It is important to note that complainant countries, not respondent countries, must point out the existence of less trade-restrictive (candidate) alternative measures, and respondent countries need only prove that the (candidate) alternative measures pointed out by complainant countries are not expected to have the same level of contribution or are not reasonably available. This is because requiring respondent countries to prove necessity by adducing all possible alternative measures that they can think of and claiming/proving the inappropriateness of these measures would make the proof of the necessity extremely difficult.<sup>16</sup>

The processes for determining the necessity are summarized in Figure II-4-4.

**Figure II-4-4 Processes for Determining the Necessity**



### <Concrete examples of determining the necessity in subparagraph (a)>

A concrete example is given below using the case of China - Publications and Audiovisual Products (DS363) as an example.<sup>17</sup>

In this case, the measure limiting importers of films for theatrical release and publications, etc. only to state-owned enterprises to conduct censorship for the purpose of protecting public morals was in dispute. The Panel pointed out with respect to [1] (importance of the policy objective) above that the protection of public morals was an important policy objective for China, and that advanced policies for protecting public morals were also implemented within China. With regard to [2] (trade-restrictive effect), the Panel pointed out that, under this measure, import of such products to the Chinese market by companies other than state-owned enterprises was restricted a priori, and thus the trade-restrictive nature of the measures was high. With regard to [3] (contribution to the achievement of the policy

<sup>14</sup> Brazil – Retreaded Tires (DS332), Panel Report, para. 7.150

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> China – Publications and Audiovisual Products (DS363), Panel Report, paras. 7.837-7.868

objectives), the Chinese government claimed that limiting importers to state-owned enterprises should be justified as “private companies objected to bearing the cost of censorship“. It was pointed out, however, that state-owned enterprises were also required to pursue profits, and thus the claim of the Chinese government was unjustified.

After comprehensively considering the above factors, the Panel determined that the degree of contribution of this measure to the protection of public morals was not significant and therefore concluded that the claim of necessity had not been established.

**ii. Protection of human, animal or plant life or health (subparagraph (b))**

**Structure of article and precedents**

Subparagraph (b) justifies “measures necessary to protect human, animal or plant life or health”. Typically, sanitary and phytosanitary measures (also covered by the SPS Agreement), import/export restrictions and domestic regulations for the purpose of protecting the safety of food and products, and some environmental regulations are covered by this subparagraph.

Similar to subparagraph (a), meeting the requirements of subparagraph (b) requires that [1] the policy objective of the measure is to “protect human, animal or plant life or health” and [2] the measure is “necessary” for achieving the policy objective.

Subparagraph (b) of GATS Article XIV has a provision similar to this subparagraph.

See Figure II-4-5 for the precedents relating to subparagraph (b).

**Figure II-4-5 Precedents Relating to Subparagraph (b) of GATT Article XX**

Case No. and Title (Determining Body)	Stage	Agreement Interpretation (Upper: Panel, Lower: Appellate Body)				
		*Note: Evaluation of ○ or × is only for the purpose of convenience				
		Violated Provision	(b) [1] (Policy objective)	(b) [2] (Necessity)	Chapeau	Conclusion
UDS2: US – Gasoline (Panel)	P	GATT Article III:4	○ (falls under)	× (does not fall under)	–	Unjustifiable
DS135: EC – Measures Affecting Asbestos and Asbestos- Containing Products (Panel/ Appellate Body)	P	GATT Article III:4	○ (falls under)	○ (falls under)	○ (does not fall under)	Justifiable
	AB	No violation	–	–	–	–
DS246: EC – Conditions for the Granting of Tariff Preferences to Developing Countries (Panel)	P	GATT Article XI:1	× (does not fall under)	× (does not fall under)	× (falls under)	Unjustifiable
DS332: Brazil – Measures Affecting Imports of Retreaded Tires (Panel/ Appellate Body)	P	GATT Article XI:1	○ (falls under)	○ (falls under)	× (falls under)	Unjustifiable
	AB		○ (falls under)	○ (falls under)	× (falls under)	Unjustifiable (*1)
DS394/395/396 China – Measures Related to the Exportation of	P	GATT Article XI:1	× (does not fall under)	× (does not fall under)	–	Unjustifiable



Various Raw Materials (Panel)						
DS431/432/433 China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (Panel/ Appellate Body)	P	GATT Article XI:1	× (does not fall under)	× (does not fall under)	–	Unjustifiable
	AB		–	–	–	– (*2)

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

\*1: The Appellate Body ruled that the measure to prohibit import of used tires meets the requirements of subparagraph (b), but two measures associated with the measure ([1] exemption of regulations on used tires from Mercosur because of a Mercosur dispute settlement decision and [2] an injunction against import prohibition laws/regulations by Brazilian courts) do not meet the requirements of the clause and are therefore unjustifiable.

\*2: China did not appeal to the Appellate Body with respect to GATT XX(b).

### Policy objectives

With regard to the policy objectives of subparagraph (b), in many cases the Panel and Appellate Body accepted the explanation that the policy objectives claimed by respondent countries fall under subparagraph (b) (see Figure II-4-5).

More concretely, “prevention of atmospheric pollution (US – Gasoline (DS2))”, “prohibition of import/distribution of Asbestos that is hazardous to human health and products containing Asbestos (EC - Asbestos (DS135))”, and “prevention of propagation of mosquitoes that transmit malaria and dengue fever (Brazil - Retreaded Tires (DS332))” were determined to fall under the policy objectives of subparagraph (b).

However, measures whose purpose is abstract “environmental protection” are not covered by subparagraph (b), and respondent countries are required to concretely prove that the objectives of the measures of concern actually constitute “protection of human, animal or plant life or health”.<sup>18</sup>

Cases in which the policy objectives were determined not to fall under subparagraph (b) include China - Raw Materials (DS394, 395, 398). China claimed that export restrictions on bauxite, etc. would result in a reduction in export demand, this would eventually lead to a reduction in domestic demand, which would contribute to pollution reduction; and therefore the measure was justifiable under subparagraph (b) of GATT XX.<sup>19</sup> The Panel found that “a significant amount of evidence of environmental protection that China submitted did not prove the measure to be a part of the framework for preventing environmental pollution” and rejected China's claim.<sup>20</sup> (No mining restriction within China was in place). In order to prove that export restrictions for the purpose of pollution reduction associated with the mining of resources fall under the policy objectives of subparagraph (b), at a minimum mining restrictions within China were considered necessary.

### Necessity of measure

The necessity determination of subparagraph (b) uses the same criteria as subparagraphs (a) and (d).

<sup>18</sup> Brazil – Retreaded Tires (DS332), Panel Report, para. 7.46

<sup>19</sup> China – Raw Materials (DS394, 395, 398), Panel Report, para. 7.494

<sup>20</sup> China – Raw Materials (DS394, 395, 398), paras. 7.501-516

**<Concrete examples of determining the necessity of subparagraph (b)>**

[1] With regard to the importance of the policy objectives, according to the precedent, protection of human life/health is determined to be the most essential and important policy objective and protection of animal and plant life/health is similarly important.<sup>21</sup>

[2] With regard to trade-restrictive effect, export duties and quotas on minerals are not as restrictive as total prohibition of export, but still have strong trade-restrictive effect.<sup>22</sup>

[3] With regard to contribution to the achievement of the policy objectives, proving the relationship of ends and means is necessary, but qualitative proof is not always required.<sup>23</sup>

**iii. Customs enforcement/cross-border regulations (subparagraph (d))****Structure of article and precedents**

Subparagraph (d) justifies “measures necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of GATT”. Typically, measures to suspend imports of intellectual property rights infringing products at borders, etc. fall under this subparagraph.

Similar to subparagraphs (a) and (b), meeting the requirements of subparagraph (b) requires that [1] the policy objective of the measure is to “secure compliance with laws and regulations which are not inconsistent with the provisions of GATT” and [2] the measure is “necessary” for achieving the policy objective.

Subparagraph (c) of GATS Article XIV has a provision that is similar to this subparagraph.

See Figure II-4-6 for the precedents relating to subparagraph (d).

**Figure II-4-6 Precedents Relating to Subparagraph (d) of GATT Article XX**

Case No. and Title (Determining Body)	Laws and regulations to be protected	Stage	Agreement Interpretation (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience				
			Violated Provision	(d) [1] (Policy objective)	(d) [2] (Necessity)	Chapeau	Conclusion
DS2: US –Gasoline (Panel)	Gasoline quality regulations (the measure recognized as violating GATT)	P	GATT Article III:4	× (does not fall under)	–	–	Unjustifiable
DS31: Canada – Certain Measures Concerning Periodicals (Panel)	Preferential taxation of Canadian periodicals	P	GATT Article XI:1	× (does not fall under)	–	–	Unjustifiable
DS155: Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Panel)	Value Added Tax Law, Corporate Tax Law	P	GATT Article III:2	○ (falls under)	○ (falls under)	× (falls under)	Unjustifiable

<sup>21</sup> Brazil – Retreaded Tires (DS332), Panel Report, paras. 7.108-7.112

<sup>22</sup> China – Raw Materials (DS394, 395, 398), paras. 7.558-7.563

<sup>23</sup> Brazil – Retreaded Tires (DS332), paras. 7.115-7.119

DS161: Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Panel/ Appellate Body)	Unfair Competition Act for the purpose of total elimination of fraud with respect to the origin of beef	P	GATT Article III:4	○ (falls under)	× (does not fall under)	–	Unjustifiable
		AB		○ (falls under)	× (does not fall under)	–	Unjustifiable
DS174/290 EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Panel)	Intellectual Property Law for the purpose of protecting trademarks, etc.	P	GATT Article III:4	× (does not fall under)	× (does not fall under)	–	Unjustifiable
DS285: US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Panel)	Organized Crime Control Act	P	GATS Article XVI	○ (falls under)	× (does not fall under)	× (falls under)	Unjustifiable
DS302: Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes (Panel/ Appellate Body)	Stamp Tax Law for the purpose of securing tax revenue	P	GATT Article III:4	○ (falls under)	× (does not fall under)	–	Unjustifiable
		AB		○ (falls under)	× (does not fall under)	–	Unjustifiable
DS308: Mexico – Tax Measures on Soft Drinks and Other Beverages (Panel/ Appellate Body)	Obligations under international agreements with the other country (the United States)	P	GATT Articles III:2, III:4	× (does not fall under)	–	–	Unjustifiable
		AB		× (does not fall under)	–	–	Unjustifiable
DS332: Brazil – Measures Affecting Imports of Retreaded Tires (Panel/Appellate Body)	Fine system (the measure recognized as violating GATT)	P	GATT Article XI:1	× (does not fall under)	–	–	Unjustifiable
DS339: China – Measures Affecting Imports of Automobile Parts (Panel)	Schedule of tariff concessions regarding automobiles	P	GATT Article III:4	× (does not fall under)	× (does not fall under)	–	Unjustifiable
DS343/345: US – Measures Relating to Shrimp from Thailand (Panel/ Appellate Body)	Laws and regulations for collecting AD duties and countervailing duties	P	GATT Articles II:1(b), X:3(a), XI:1	○ (falls under)	× (does not fall under)	–	Unjustifiable
		AB		○ (falls under)	× (does not fall under)	–	Unjustifiable
DS366: Colombia – Ports of Entry (Panel)	Customs Law for preventing money laundering	P	GATT Article V:2	○ (falls under)	× (does not fall under)	–	Unjustifiable

DS371: Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Panel/ Appellate Body)	Value Added Tax Law for securing the effectiveness of tax collection	P	GATT Article III:4	×	–	–	Unjustifiable
		AB		×	×	–	Unjustifiable
DS453: Argentina – Measures relating to Trade in Goods and Services (Panel/ Appellate Body)	Taxation laws and regulations and criminal laws and regulations for preventing corporate income tax evasion	P	GATS Articles II:1, XVI, XVII	○	○	×	Unjustifiable
		AB		○	○	--*1	Unjustifiable
DS456: India – Certain Measures Relating to Solar Cells and Solar Modules (Panel/ Appellate Body)	Laws, regulations and treaties for providing the obligation to secure environmentally sustainable growth	P	GATT Article III:4, TRIMs Article 2.1	×	×	-	Unjustifiable
		AB		×	-	-	Unjustifiable
DS461: Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear	Laws and regulations for combating money laundering	P	GATT Article II:1(a) and (b)	×	×	×	Unjustifiable

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

\*1: Neither party appealed to the Appellate Body the Panel's determination regarding the chapeau of GATT XX.

\*2: The Panel found that because there was no relevance between the measure and the purported purpose, it was not possible to consider that the measure has been designed for that purpose.

### Policy objectives

The policy objectives of subparagraph (d) require that the measures of concern are intended to secure compliance with laws and regulations which are not inconsistent with the provisions of GATT.

Subparagraph (d) was invoked by respondent countries as a general provision in many cases, but it is less likely than under subparagraphs (a) and (b) that they are determined not to meet the requirements of the policy objectives (see Figure II-4-6). Interpretations of subparagraph (d) adopted in the past cases are described below:

First, "laws and regulations" are understood only to include domestic laws and regulations, and not to include international agreements. In the case of Mexico - Taxes on Soft Drinks (DS308), in which the issue was whether or not the measures taken to be compliant with the obligations under NAFTA were justifiable under subparagraph (d), the Appellate Body determined that subparagraph (d) was applicable only to domestic laws on the grounds that [1] international agreements could not be associated with the wording laws and regulations used in subparagraph (d), [2] laws and regulations listed in subparagraph (d) (those relating to customs enforcement, the enforcement of monopolies, etc.) typically were domestic laws and regulations, and [3] unlike subparagraph (d), subparagraph (h) of

GATT Article XX explicitly referred to international agreements.<sup>24</sup>

In addition, the precedent stated that it was clear from the wording that for laws and regulations to be compliant they must be consistent with GATT.<sup>25</sup> In EC - Trademarks and Geographical Indications (DS174) and Brazil - Retreaded Tires (DS332), laws and regulations that were supposed to comply per se were determined to violate GATT and thus were not justified.

With regard to “securing compliance”, the measures of concern needed to be designed to secure compliance with the laws and regulations.<sup>26</sup> That is, measures that cannot be explained in light of the objectives of securing compliance are deemed not to be measures for “securing compliance”. However, the performance level shall be determined by respondent countries, and so, for example, measures without binding effect or effect of non-performance may be acceptable.<sup>27</sup>

#### Necessity of measure

The necessity determination of subparagraph (d) uses the same criteria as subparagraphs (a) and (b).

#### **<Concrete examples of determining the necessity of subparagraph (d)>**

A concrete example is given below using the case of Dominican Republic - Import and Sale of Cigarettes (DS302).

In this case, the dispute involved a measure to prohibit the affixation of tax stamps outside of the Dominican Republic and to require the affixation of tax stamps on individual packages under the supervision of tax authority inspectors within the Dominican Republic for the purpose of preventing unlawful import and tax evasion of cigarettes. The Panel determined that [1] with regard to the importance of the policy objectives, i.e. securing tax revenue, was the most important interest for a country, in particular for developing countries such as the Dominican Republic. [2] With regard to the trade-restrictive effect, export was still possible despite existence of the measure, and since export of cigarettes from Honduras (complainant country) to the Dominican Republic was increasing, a strong trade-restrictive effect could not be determined. [3] With regard to contribution to the achievement of the policy objectives, it was determined that the measure did not prevent counterfeiting of tax stamps, unlawful import or tax evasion of cigarettes; instead, police enforcement would play more important roles. As a conclusion, necessity was preliminarily determined.<sup>28</sup>

Honduras proved that a system which would allow foreign producers to affix revenue stamps at the production stage before import and secure performance through inspection/verification before shipping would be a less trade-restrictive alternative measure, and the Dominican Republic did not establish that this alternative would not achieve the same level of protection and achievement of its objectives.<sup>29</sup> As a result, the Panel concluded that the requirement of necessity had not been met.

#### **iv. Cases of conservation of exhaustible natural resources (subparagraph (g))**

##### Structure of article and precedents

Subparagraph (g) justifies measures relating to the conservation of exhaustible natural resources. Precedents have involved restrictions on production/consumption of oil and minerals for the purpose of resource conservation within the country, etc.

Meeting the requirements of subparagraph (g) requires that [1] the policy objective of the measure of concern is to “conserve limited natural resources”, [2] the measure is “relating” to the conservation

<sup>24</sup> Mexico – Taxes on Soft Drinks (DS308), Appellate Body Report, paras. 69-80

<sup>25</sup> EC – Trademarks and Geographical Indications (DS174), Panel Report, para. 446

<sup>26</sup> Korea – Various Measures on Beef (DS161), Appellate Body Report, paras. 157-158

<sup>27</sup> Mexico – Taxes on Soft Drinks (DS308), Appellate Body Report, para. 74

<sup>28</sup> Dominican Republic – Import and Sale of Cigarettes (DS302), Panel Report, paras. 212-226

<sup>29</sup> *Id.*, paras. 227-232

of limited natural resources, and [3] the measure is implemented alongside restrictions on domestic production or consumption.

See Figure II-4-7 for the precedents relating to subparagraph (g).

**Figure II-4-7 Precedents Relating to Subparagraph (g) of GATT Article XX**

Case No. and Title (Determining Body)	Stage	Agreement Interpretation (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience					
		Violated Provision	(g) [1] (Policy objective)	(g) [2] (Relationship)	(g) [3] (Balance with domestic regulation)	Chapeau	Conclusion
DS2: US –Gasoline (Panel/ Appellate Body)	P	GATT Article III:4	○ (falls under)	× (does not fall under)	–	–	Unjustifiable
	AB		○ (falls under)	○ (falls under)	○ (falls under)	× (falls under)	Unjustifiable
DS58: US – Import Prohibition of Certain Shrimp and Shrimp Products (Panel/ Appellate Body)	P	GATT Article XI:1	–	–	–	× (falls under) (*2)	Unjustifiable
	AB		○ (falls under)	○ (falls under)	○ (falls under)	× (falls under)	Unjustifiable
Compliance verification of the same case (Panel/ Appellate Body)	P		○ (falls under)	○ (falls under)	○ (falls under)	○ (does not fall under)	Justifiable
	AB		○ (falls under)	○ (falls under)	○ (falls under)	○ (does not fall under)	Justifiable
DS381: US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Compliance verification) (Panel/Appellate Body)	P	GATT Articles I:1 and III:4	○ (falls under)	○ (falls under)	–	○ (falls under)	Unjustifiable
	AB		○ (falls under)	○ (falls under)	–	○ (falls under)	Unjustifiable
DS394/395/398: China – Measures Related to the Exportation of Various Raw Materials (Panel/ Appellate Body)	P	GATT Article XI:1	○ (falls under)	× (does not fall under)	× (does not fall under)	–	Unjustifiable
	AB		○ (falls under)	× (does not fall under)	× (does not fall under)	–	Unjustifiable
DS431/432/433: China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (Panel/ Appellate Body)	P	GATT Article XI:1	× (does not fall under)	× (does not fall under)	× (does not fall under)	× (falls under)	Unjustifiable
	AB		× (does not fall under)	× (does not fall under)	× (does not fall under)	× (falls under)	Unjustifiable

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

\*1: The Panel discussed the chapeau before subparagraph (g), but this approach was explicitly rejected

by the Appellate Body on the grounds that discussion of the chapeau, which analyzes application methods of the measure, should take place after discussing the measure *per se*<sup>30</sup> (see 2 (1) (a)).

### Policy objectives

The policy objectives of subparagraph (g) require that the measures of concern are intended for “conservation of exhaustible natural resources”.

According to the precedent, “exhaustible natural resources” are broadly understood, and include minerals, non-living natural resources (coal, oil, natural gas, etc.) as well as environmental resources such as “clean air” (US - Gasoline (DS2)).

Living resources are also included as natural resources. The Appellate Body in the US - Shrimp (DS58) case construed GATT as an agreement whose focus evolved over time, and concluded that sea turtles, a living resource, were included as natural resources because both living and non-living resources were included as natural resources in other environmental protection agreements/declarations, and sea turtles were listed as an endangered species in the Washington Convention, etc.<sup>31</sup>

The US - Shrimp (DS58) case can also be a useful reference regarding whether or not the measure to protect exhaustible natural resources outside the territory of implementing countries is justifiable under subparagraph (g). In this case, the issue of whether or not the US measure was one to protect the environment outside the US was raised, and it was determined that sea turtles are “exhaustible natural resources”, because They are highly migratory animals and their migration range extended into US territorial waters; therefore a sufficient nexus existed between sea turtles and the US.<sup>32</sup> This case is an example where the existence of a sufficient nexus between implementing countries and exhaustible natural resources outside their regions was determined. In the absence of such nexus, however, it is still unclear whether or not implementing countries can take measures to protect exhaustible natural resources outside their territory. A similar argument may apply in the context of subparagraph (b) regarding whether implementing countries can take measures to protect life or health of humans or animals outside their territory.

With regard to the interpretation of “conservation”, the Panel Report in the China - Rare Earth elements case (DS431, 432, 433) determined that economic growth could also be considered in the interpretation of “conservation”, but that the right to control domestic and overseas distribution of mineral resources that have been mined and would be placed in market transactions could not be determined under the WTO Agreement. This means that not allowing transactions of resources in order to benefit future generations may be accepted as “conserving”, but distributing resources in such a manner as to give priority to domestic industries cannot be interpreted as “conserving”.

### Relationship of measures and means

When a measure of concern falls within the policy objectives of subparagraph (g), the measure is justified only if the measure is “relating” to the conservation of exhaustible natural resources. The relationship criteria of subparagraph (g) are distinct from the criteria of subparagraphs (a), (b) and (d). However, they share a common determination framework that the measures that cannot be explained in light of the policy objectives of the measures cannot be justified.

According to precedent, these criteria require that “a close and genuine relationship of ends and

<sup>30</sup> US – Shrimp (DS58), Appellate Body Report, paras. 118-120

<sup>31</sup> *Id.*, paras. 128-131

<sup>32</sup> *Id.*, para. 133

means exists between the objectives of the measure and the structure/design of the measure”.<sup>33</sup> That is, measures whose structures, etc. cannot be explained in light of the objectives of the measures cannot be justified.

### <Examples of the relationship determination of subparagraph (g)>

In the US - Shrimp (DS58) case, “relationship” was affirmed on the grounds that the scope of application was not disproportionately wide in relation to the policy objective in light of structure and design of the measure (principle of proportionality between the objectives and scope of application).<sup>34</sup>

In the China - Raw Materials case (DS394, 395, 398), relationship was denied on the grounds that, while mining restriction was deemed more effective than export prohibition for conserving domestic resources, no mining restriction was implemented in China, and the volume of minerals mined actually increased after introduction of the measure.<sup>35</sup>

### Balance with domestic regulation

Lastly, the measures need to be “made effective in conjunction with restrictions on domestic production or consumption”. According to the precedent, this requirement is understood as requiring the measures to operate so as to conserve an exhaustible natural resource or be applied jointly and work together with restrictions on domestic production or consumption.<sup>36</sup>

In addition, when the measures are implemented in conjunction with restrictions on domestic consumption, with regard to the level of restrictions, equality is not required in treating imported products and domestic products equally, but even-handedness is required.<sup>37</sup>

The Panel Report in the China - Rare Earth elements, etc. (DS431, 432, 433) case stated that the balance required here was regulatory or structural balance, and would not be determined by the actual effect. The Report then found that export restrictions that imposed structural burdens only on foreign users was problematic. The Appellate Body ruled that the Panel erred in determining that even-handedness should be discussed in addition to the requirements provided for in Article XX(g). However, the Appellate Body supported the idea of considering regulatory/structural balance, and concluded, by supporting the Panel’s ruling that the measure could not be justified under Article XX(g).

## **(2) CHAPEAU OF GATT ARTICLE XX**

### ***(a) Structure and precedents***

Even if the measures formally fall within the respective subparagraphs of GATT Article XX, disguised protectionist measures were not justified.

From the point of view of preventing abuse of justifiable reasons, the chapeau states that two types of application methods are not justified. More concretely, the chapeau provides that measures applied [1] “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or [2] “a disguised restriction on international trade” are not justifiable.

It was determined in precedents that the chapeau is an expression of the principle of good faith, a general principle of international laws, and prohibits abuse of measures that formally meet the requirements of one of the subparagraphs of Article XX. The Appellate Body stated that “the task of

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<sup>33</sup> *Id.*, paras. 137-142; China – Raw Materials (DS394, 395, 398), Appellate Body Report, paras. 355

<sup>34</sup> US – Shrimp (DS58), Appellate Body Report, para. 141

<sup>35</sup> China – Raw Materials (DS394, 395, 398), Panel Report, paras. 7-416-435

<sup>36</sup> China – Raw Materials (DS394, 395, 398), Appellate Body Report, paras. 353-361

<sup>37</sup> US – Gasoline (DS2), Appellate Body Report, ps. 22



interpreting and applying the clause is, hence, essentially a delicate one of locating and making out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions of the GATT”<sup>38</sup> and “the location of this line of equilibrium may move as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ”.<sup>39</sup> Therefore, interpretation of the chapeau involves coordination of the rights of member countries to regulate with the trade liberalization benefits of other member countries.

GATS Article XIV has a provision similar to that of the chapeau of GATT Article XX.

See Figure II-4-8 for the precedents relating to the chapeau. As shown in II-4-8, in many of the precedent cases, the requirements of the respective subparagraphs were met, but the requirements of the chapeau were not, and thus the measures were not justified. Therefore, understanding what is recognized as discrimination under the chapeau can offer good guidance in case Japanese industries are faced with trade-restrictive measures of foreign governments (see 2) (1) (a) for the relationship between violations of the respective subparagraphs/clauses and methods of implementing the decisions under the chapeau).

The concrete contents of the clause and previous precedent cases are described below:

**Figure II-4-8 Precedents Relating to the Chapeau of GATT Article XX**

Case No. and Title (Determining Body)	Stage	Agreement Interpretation (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience				
		Violated Provision	Subparagraph of Article XX	Chapeau [1] (Application in a manner of arbitrary or unjustifiable discrimination)	Chapeau [2] (Application in a manner of disguised trade-restrictive restriction)	Conclusion
DS2: US – Gasoline (Panel/ Appellate Body)	P	GATT Article III:4	× (subparagraph (g))	–	–	Unjustifiable
	AB		○ (subparagraph (g))	× (falls under)	× (falls under)	Unjustifiable
DS58: US – Import Prohibition of Certain Shrimp and Shrimp Products (Panel/ Appellate Body)	P	GATT Article XI:1		× (falls under)	–	Unjustifiable
	AB		○ (subparagraph (g))	× (falls under)	–	Unjustifiable
Compliance verification of the same case (Panel/ Appellate Body)	P		○ (subparagraph (g))	○ (does not fall under)	○ (does not fall under)	Justifiable
	AB		○ (subparagraph (g))	○ (does not fall under)	–	Justifiable
DS135: EC – Measures Affecting Asbestos and Products Containing Asbestos (Panel/ Appellate Body)	P	GATT Article III:4	○ (subparagraph (b))	○ (does not fall under)	○ (does not fall under)	Justifiable
	AB	No violation	–	–	–	

<sup>38</sup> US – Shrimp (DS58), Appellate Body Report, paras. 158-159

<sup>39</sup> Brazil – Retreaded Tires (DS332), Appellate Body Report, para. 224

## Part II: WTO Rules and Major Cases

DS155: Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Panel)	P	GATT Article III:2	○ (subparagraph (d))	× (falls under)	–	Unjustifiable
DS246: EC – Conditions for the Granting of Tariff Preferences to Developing Countries (Panel)	P	GATT Article I:1	× (subparagraph (b))	× (falls under)	–	Unjustifiable
DS285: US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Panel/Appellate Body)	P	GATS Article XVI	○ (subparagraph (a) of Article XIV)	× (falls under)	× (falls under)	Unjustifiable
	AB		○ (subparagraphs (a) and (c) of Article XIV)	× (falls under)	× (falls under)	Unjustifiable
DS332: Brazil – Measures Affecting Imports of Retreaded Tires (Panel/ Appellate Body)	P	GATT Article XI:1	○ (subparagraph (b))	× (falls under)	× (falls under)	Unjustifiable
	AB		○ (subparagraph (b))	× (falls under)	× (falls under)	Unjustifiable
DS381: US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Panel/Appellate Body)	P	GATT Articles I:1, III:4	○ (subparagraph (g))	(x) (eligibility requirement) ○ (does not fall under) (y) (certifying and tracking requirements) × (falls under)	–	(x) Justifiable (y) Unjustifiable
	AB		– (not appealed)	× (falls under) (*2)	–	Unjustifiable
DS400/401 EC – Measures Prohibiting the Importation and Marketing of Seal Products <sup>40</sup> (Panel/ Appellate Body)	P	GATT Articles I:1, III:4	○ (subparagraph (a))	× (falls under)	–	Unjustifiable
	AB		○ (subparagraph (a))	× (falls under)	× (falls under)	Unjustifiable
DS431/432/433 China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (Panel/ Appellate Body)	P	GATT Article XI:1	× (subparagraph (g))	× (falls under)	× (falls under)	Unjustifiable
	AB		–	–	–	–
DS453: Argentina – Measures Relating to Trade in Goods and	P	GATS Articles II.1, XVI, XVII	○ (GATS XIV subparagraph (c))	× (falls under)	–	Unjustifiable
	AB		○	–	–	Unjustifiable

<sup>40</sup> This case was also brought to the European Court of Justice and a judgment that the measure in dispute was legal under EU law s became final on April 25, 2013.

Services (Panel/ Appellate Body)			(GATS XIV subparagraph (c))	(*3)		
DS461: Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (Panel/ Appellate Body)	P	GATT Article II.1 (a)	× (subparagraphs (a) and (d))	× (falls under)	× (falls under)	Unjustifiable
	AB	and (b)	× (subparagraphs (a) and (d))	-	-	Unjustifiable

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

\*1: The Appellate Body ruled that the measure to prohibit import of used tires met the requirements of subparagraph (b), but two measures associated with the measure ([1] exemption of used tires from Mercosur because of a Mercosur dispute settlement decision and [2] an injunction by Brazilian courts prohibiting enforcement of the import prohibition laws/regulations) did not meet the requirements of the chapeau and therefore were unjustifiable.

\*2: The Appellate Body reversed the Panel's finding regarding the compliance measure, stating that the eligibility requirement, the certification requirement and the tracking requirement should have been analyzed integrally, not separately as three elements. Further, the Appellate Body determined that it could not complete a legal determination because the Panel did not find facts (injury risk of related fishing methods) that are required as a precondition to such determination. However, the Appellate Body found that at least the setting of conditions under the determination clause (a clause that requires certification by an observer when a competent agency determines that certain conditions are met) is based on arbitrary discrimination with regard to the conditions therein (even if no additional fact is found), and therefore the compliance measure was not justified under GATT Article XX.

\*3: Neither party appealed to the Appellate Body the Panel's determination regarding the chapeau of GATT XX.

***(b) Arbitrary or unjustifiable discrimination between countries where the same conditions prevail***

With regard to the first type of application method, where measures are applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail are prohibited. Here, this discrimination does not amount to inconsistency with the national treatment obligation of GATT Article III. It requires special attention that this type, arbitrary or unjustifiable discrimination is not justified under Article XX notwithstanding that it does not formally violate the national treatment obligation of GATT Article III.<sup>41</sup>

This type of application method was in dispute in many dispute settlement proceedings, and the analysis of whether there was discrimination between countries where the same conditions prevail focused on whether or not there was a rational connection between the measure and the objective. Interpretation of "between countries where the same conditions prevail" varies from case to case; no standard criteria exist. However, it is understood not only that [1] cases where the measures are applied differently to countries where the same conditions prevail are included, but also [2] cases where the measures are applied uniformly to countries where the same conditions do not prevail are included.

**<Concrete examples of the determination of the chapeau (first type)>**

Concrete examples of the determination of the clause with regard to the first type are given below.

In the US - Shrimp (DS58) case, a measure requiring implementation of a program to avoid sea turtle by-catch equivalent to that in the US was in dispute. The four reasons that the Appellate Body gave in

<sup>41</sup> US – Gasoline (DS2), Appellate Body Report, ps. 23

determining that the measures violated the first type of discrimination set out in the chapeau are as follows: [1] the US did not consider the different situations of each country, but uniformly enforced the certification processes on all complainant countries, etc.; [2] while negotiations on sea turtle protection were conducted with other shrimp exporting countries, negotiations did not take place with the complainant countries; [3] the complainant countries were provided a transition period shorter than that provided to other shrimp exporting countries; and [4] the US did not provide sufficient technology transfer support to the complainant countries when compared to other shrimp exporting countries.<sup>42</sup>

In the EC - Tariff Preferences (DS246) case, imposition of preferential duties on Pakistan, etc. for the purpose of combating drug trafficking was in dispute. The fact that different treatment was given to Pakistan and Iran could not be explained in light of the objective of the measure, and therefore the measure was determined to be discriminatory and not in conformity with the chapeau.<sup>43</sup>

In the US - Gambling (DS285) case, partially allowing domestic service suppliers to supply cross-border gambling services was in dispute. It was determined that whether or not discrimination existed should be determined from the wording of laws and regulations, and not just based on the results of application in the individual cases.<sup>44</sup>

In the Brazil - Retreaded Tires (DS332) case, the fact that imports of recycled tires from the EU were prohibited while imports of recycled tires from Mercosur member countries were not was in dispute. The Appellate Body rejected the assertion that the decision should be based only on the effects of the discrimination (decrease in trade volume, and random and capricious implementation) without considering the objective of the measure. It said that the assessment of whether the discrimination was arbitrary or unjustifiable should be made in light of the objective of the measure.<sup>45</sup>

In the US - Tuna (DS381) case, the Appellate Body in the compliance procedure reviewed compliance measures relating to – (1) the eligibility requirement (the fishing method of setting on dolphins is ineligible for the dolphin-safe label), (2) the certification requirements (certification by independent observers is required for attaching the dolphin-safe label), and (3) the tracking requirements (it must be indicated that tuna meeting conditions for the dolphin-safe label are isolated from other tuna). It concluded that “discrimination between countries where the same conditions prevail,” as used in the chapeau of GATT Article XX, refers to the fact that, with respect to tuna from Mexico, the US and third countries, tuna fishing causes risks of harm to dolphins in this case, and thus such tuna are under the same prevailing conditions. In doing so, the Appellate Body rejected a US argument that the relevant conditions for tuna products with different risks of harm are not the same.

Then, it found that, at least with regard to the determination clause (see Note 2 of Figure II-4-8 above) for certification and tracking requirements, practices of labeling upon certification by an observer are not ensured for all circumstances where risks of harm to dolphins are similarly high, and as a result, the certification and tracking requirements imposed on the large purse-seine fishery conducted in the Eastern Tropical Pacific Ocean, where tuna from Mexico originate, differ from those imposed on others. Therefore the design of the compliance measure has aspects that are difficult to reconcile with the objective of protecting dolphins from harm. Accordingly, it ruled that this constitutes arbitrary and unjustifiable discrimination, and is not justified under GATT Article XX<sup>46</sup>.

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<sup>42</sup> US – Shrimp (DS58), Appellate Body Report, paras. 161-176

<sup>43</sup> EC – Tariff Preferences (DS246), Panel Report, paras. 228-234

<sup>44</sup> US – Gambling (DS285), Appellate Body Report, paras. 353-357

<sup>45</sup> Brazil – Retreaded Tires (DS332), Appellate Body Report, paras. 227-231

<sup>46</sup> US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Article 21.5 Appellate Body Report, paras. 7.359-7.360.

**(c) *Disguised restriction on trade***

With regard to the second type of application method, “disguised restriction on trade”, the precedent cases are limited when compared to the first type, “arbitrary or unjustifiable discrimination” (see Figure II-4-9).

According to the precedent, it was determined that [1] discrimination which is arbitrary or not justifiable, and [2] a disguised restriction on international trade, should be read side by side; however, precise guidance was not provided. In addition, in many cases, application of the same measure was determined to overlap both [1] and [2] (see Figure II-4-8). For example, in the US – Gasoline case (DS2), individually applying the baselines to domestic gasoline, with consideration given to the cost for producers, while baselines were applied uniformly to imported gasoline, was determined to be an unjustifiable discrimination and also a disguised restriction on international trade.<sup>47</sup>

Similar to the first type, whether or not a disguised restriction exists is determined based on the content of the measures<sup>48</sup> (see (ii)). In addition, a decision should be based not only on the application results, but also on the objective of the measure.<sup>49</sup>

**(3) JUSTIFICATION OF NON-GATT MEASURES**

As described in 2) (1), GATT Article XX is used for exemptions to obligations of GATT provisions. A question arises as to whether it can be used to justify non-GATT measures.

**(a) *WTO Accession Protocol of China***

With regard to the measures violating the WTO Accession Protocol of China, there were three precedent cases in which invocation of GATT Article XX was in dispute.

First, in the China - Publications and Audiovisual Products (DS363) case, China’s measure that grants the right to import publications and films for theatrical release, etc. only to state-owned enterprises and not to foreign enterprises was in dispute. China claimed that even if the measure violated Article 5.1 (right to trade) of the WTO Accession Protocol of China, the measure was justified under subparagraph (a) of GATT Article XX. The Appellate Body determined that Article XX was applicable to the WTO Agreements “in a manner consistent with the WTO Agreements” and [2] that measures justified under exemption provisions of the WTO Agreements were also included<sup>50</sup> because Article 5.1 of the WTO Accession Protocol of China preserved the rights of China, as since obligations were “without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement”.<sup>51</sup> Therefore, the Appellate Body was concluded that GATT Article XX could be invoked with regard to measures alleged to violate Article 5.1 of the WTO Accession Protocol of China.

In the China – Raw Materials (DS394, 395, 398) case, China’s imposition of export duties on nine items of raw materials was in dispute. China claimed that even if the measure violates Article 11.3 (prohibition of export duties) of the WTO Accession Protocol of China, China claimed that justification under subparagraph (g) of GATT Article XX should be accepted. The Panel determined that GATT XX may not be invoked because Article 11.3 of the WTO Accession Protocol of China uniformly prohibits export duties and lacks the provision for preserving China’s rights as was the case in Article 5.1 of the same Protocol.<sup>52</sup> Similar decisions were maintained in the Panel Report and the

<sup>47</sup> US – Gasoline (DS2), Appellate Body Report, ps. 25

<sup>48</sup> EC – Asbestos (DS135), Panel Report, para. 8.236

<sup>49</sup> Brazil – Retreaded Tires (DS332), Appellate Body Report, paras. 238-239

<sup>50</sup> China – Publications and Audiovisual Products (DS363), Appellate Body Report, para. 223

<sup>51</sup> *Id.*, Appellate Body Report, para. 218

<sup>52</sup> China – Raw Materials (DS394, 395, 398), Panel Report, paras. 121-129, 149-160

Appellate Body Report on the China - Rare Earth elements, etc. (DS431, 432, 433).

***(b) Other Agreements (SPS Agreement, TBT Agreement, Agreement on Subsidies, etc.)***

As described in (i), according to the precedent, in determining whether or not GATT Article XX may be invoked in the WTO Accession Protocol of China, the specific wording of the Articles at issue determines whether GATT Article XX is applicable. It may be considered from this determination that whether specific wording of each non-GATT agreement is intended for the application of GATT Article XX or not will be used as the criterion.

On the other hand, taking into consideration that the TBT Agreement and the Agreement on Subsidies do not contain wording that deals with the application of GATT Article XX, invocation of GATT Article XX as an affirmative defense for justifying violations of the respective agreements is not considered possible. However, the TBT Agreement controls measures based on non-trade concerns as well as trade concerns, and Articles 2.1 and 2.2 of the TBT Agreement allows consideration of the policy objectives of the measure in much the same manner as would be the case under GATT Article XX.

**(4) SECURITY EXCEPTIONS (GATT ARTICLE XXI AND GATS ARTICLE XIV:2)**

***(a) Functions and Structure of the Articles***

While GATT Articles XX and XIV are used to exempt measures based on various domestic policies, measures taken for security purposes are justified under GATT Article XXI. GATS Article XIV: 2 has provisions that are similar to those of GATT Article XXI.

GATT Article XXI consists of subparagraphs (a) to (c) (see Figure II-4-9).

**Figure II-4-9 Contents of GATT Article XXI**

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

As GATT Article XXI controls the area of vital interests of countries, i.e. security, it has a different structure than that of GATT Article XX in the following respects: First, under GATT Article XXI, a member country can determine “its essential security interests”. Second, GATT Article XXI does not have provisions to prevent abuse as in the chapeau of GATT Article XX, and thus each member country is granted broad discretion.

Unlike GATT Article XX, the interpretation of GATT Article XXI has never been presented to the Appellate Body in a WTO dispute settlement proceeding.

***(b) Concrete Example***

Although there have been no cases in which there has been a decision by a Panel or the Appellate Body involving GATT Article XXI, disputes involving import restrictions implemented for the purpose of security had been involved in the GATT prior to the coming into force of the WTO.<sup>53</sup> In addition, after establishment of WTO issues relating to measures implemented because of security concerns have been raised; they include the following:

***i. Security Trade Control***

Export restrictions on goods/technologies that can be used for the development of armaments and weapons of mass destruction are implemented in each country for the purpose of maintaining domestic and international peace and security. See Column “Security Trade Control” in Part III for details.

***ii. Helms-Burton Act***

The Helms-Burton Act, which imposes US economic sanctions against Cuba, was the only case in which WTO dispute settlement procedures were initiated in relation to GATT Article XXI. However, no Panel examinations took place and the Panel ceased to exist in 1998) (see “Unilateral Measures” in Chapter 3 “The United States”, Part I for details).

***iii. Import/Export Restrictions on Conflict Diamonds***

Since 1998, the issue involving transactions of conflict diamonds that had been a funding source of anti-government forces in the Angolan Civil War has been a concern of the international community. In 2000 and 2001, the UN Security Council adopted resolutions to impose sanctions on Angola (Resolution 1173 (1998) and Resolution 1295 (2000)), Sierra Leone (Resolution 1306 (2000), Resolution 1343 (2001)), and Liberia (Resolution 1343 (2001)).

The Kimberley Process Certification Scheme for discussing regulations on transactions of rough diamonds was initiated in May 2002. As a result, a framework document proving a basic international certification system for international transactions of rough diamonds was agreed in November 2002, and the system came into force on January 1, 2003.

However, this system, which restricts imports of rough diamonds not consistent with the framework, was suspected of being inconsistent with the WTO Agreements, and Japan in cooperation with Sierra Leone proposed a waiver of most-favored-nation treatment obligations (GATT Article I) and general elimination of quantitative limitations (GATT Articles XI and XIII) with regard to measures imposing total prohibition of imports/exports of diamonds to non-contracting party countries of the Kimberley Process Certification Scheme. The waiver based on Article IX:3 of the Agreement Establishing the WTO to exempt obligations of member countries under the WTO Agreement with the consent of member countries; see 2) (2) (d) of Chapter 1) was granted upon in February 2003; it is closely related to GATT Article XXI.

A waiver was used to resolve the issue because this measure was difficult to justify under GATT Article XXI for the following reasons: [1] With regard to subparagraph (b) of GATT Article XXI, the measure concerning local conflicts in remote locations might not be considered countries’ “essential security interests”, [2] with regard to (ii) of subparagraph (b) of GATT Article XXI, it is difficult to

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<sup>53</sup> As an example, the ban of exports to South Africa by the UN member countries following the adoption of the resolution condemning the policy of apartheid by South Africa and the resolution to prohibit export of arms, ammunition, and military vehicles by the United Nations Security Council in 1977 were cited ((GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995) (P.605)). Another example was the import quota system for shoes introduced in Sweden in 1975, which was suspected of being inconsistent. Sweden claimed that the measure was intended to maintain domestic production capacity to prepare for a period of war and other emergencies in international relations, and thus was in line with the spirit of GATT Article XXI. However, many GATT member countries questioned the consistency of the measure with the Agreements, and the measure was abolished in 1977 (L/4250, L/4250/Add.1, L/4254).

prove that traffic in conflict diamonds actually was a funding source of anti-government forces and thus it might not be considered “traffic ... carried on ... indirectly for the purpose of supplying a military establishment”, and [3] with regard to subparagraph (c) of GATT Article XXI, the UN resolution only prohibited imports of conflict diamonds from Angola, etc., and thus total prohibition of imports/exports of conflict diamonds in non-contracting party countries of the Kimberley Process Certification Scheme might not be considered an “action in pursuance of its obligations under the United Nations Charter”.

### ***3. ECONOMIC VIEW AND SIGNIFICANCE***

Justifiable reasons for GATT Articles XX and XXI play a role of coordinating the trade liberalization benefits with trade restrictions associated with the implementing of legitimate domestic policies.

The principles of trade liberalization described in each Chapter of Part II are established to secure economic rationality. However, even a measure that deviates from the principles of trade liberalization can still be justified if the objective of the measure is to achieve legitimate domestic policies. If justifications were accepted too easily, this would allow member countries to take arbitrary measures and might result in the free-trading system losing substance. Therefore, coordinating the interests of member countries and thereby establishing an effective free-trade system is an important element in application of these Articles.

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## **MAJOR CASES**

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### ***(1) US - Gasoline (DS2)***

(See “US-Import Restriction on Gasoline” of 4. “Major Cases” in Chapter 2, Part II)

### ***(2) US - Shrimp (DS56)***

(See “(2) US - Import Restrictions on Shrimp and Shrimp Products” of 5. “Major Cases” in Chapter 3, Part II)

### ***(3) EC - Asbestos (DS135)***

(See “France’s (EU) Ban on the Import and Distribution of Asbestos and Products Containing Asbestos” of 4. “Major Cases” in Chapter 2, Part II)

### ***(4) US - Gambling (DS285)***

(See “(3) United States - Online Gambling Services” of 3. “Major Cases” in Chapter 12, Part II)

### ***(5) Dominican Republic - Import and Sale of Cigarettes (DS302)***

The Dominican Republic introduced this measure that required the affixation of tax stamps on the individual packages of both domestic and imported cigarettes under the supervision of tax authority inspectors within the Dominican Republic.

Jamaica, an exporting country of cigarettes to the Dominican Republic, requested WTO consultations in October 2003 claiming that this measure violated GATT Article III:4 on the grounds that although the measure seemingly imposed the same obligations on both domestic and imported products, additional costs were actually imposed only on imported products.



No agreement was reached in the consultations, and so DSB decided to establish a Panel in January 2004; the Panel sent the final report to member countries in November of the same year.

In the Panel examinations, the Dominican Republic claimed that the measure was consistent with GATT Article III: 4 and, if not, was justifiable under subparagraph (d) of GATT XX. The Panel determined that the measure resulted in less favorable treatment for imported products, and this constituted discrimination. The Panel then determined that the measure did not meet the “necessity” requirement under subparagraph (d) of GATT Article XX and so was not justifiable under that subparagraph.

In the determination of “necessity” by the Panel, Jamaica proposed a less trade-restrictive alternative measure of “distributing tax stamps to foreign importers and allowing them to affix the tax stamps on the products in foreign countries before exporting the products”, but the Dominican Republic argued that it was not proven that the objectives could be achieved by this alternative measure.

The Dominican Republic appealed to the Appellate Body, but the Appellate Body supported the Panel decision and the decision became final.

### ***(6) Brazil - Retreaded Tires (DS332)***

(See “(3) Measures Relating to Brazil’s Import of Recycled Tires” of 5. “Major Cases” in Chapter 3, Part II)

### ***(7) China - Publications and Audiovisual Products (DS363)***

(See “(5) China - Regulations Related to Electronic Payment Services” of 3. “Major Cases” in Chapter 12, Part II)

### ***(8) Colombia - Ports of Entry (DS366)***

There were 26 customs ports used for international trade in Colombia, but imports of textiles, apparel and footwear were limited to 11 ports for the purpose of preventing customs fraud. The above-mentioned items from Panama (produced in Panama or imported from Panama) were further limited to the Bogotá and Barranquilla airports.

However, products from Panama imported to countries other than Colombia that went through Colombia for “transshipment” could go through any of the above-mentioned 11 ports.

Panama requested WTO consultations with Colombia, claiming that the measure violated GATT Articles I, X, and XI, but no agreement was reached in the consultations. A Panel was established in October 2007, and its final report was sent to member countries in April 2009.

In the Panel examinations, Colombia claimed that the measure did not violate the above-mentioned GATT Articles and, if it did, was justifiable under subparagraph (d) of GATT Article XX. The Panel determined that the measure violated the respective GATT Articles, and the measure did not meet the “necessity” requirement under subparagraph (d) of GATT Article XX, and thus was not justifiable.

### ***(9) US - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381)***

(See (3) of 2. “Major Cases” in Chapter 11)

### ***(10) China - Raw Materials (DS394, 395, 398)***

(See “(4) China - Measures relating to the export of raw materials” of 4. “Major Cases” in Chapter 3)

“Export Restrictions” <Reference>, Part II)

**(11) *EC - Measures Prohibiting the Importation and Marketing of Seal Products*  
(DS400, 401)**

(See (6) of 2. “Major Cases” in Chapter 11 “Standards and Conformity Assessment Systems”, Part II)