

THE CONSISTENCY AND JUSTIFICATION OF THE MEASURES UNDER THE GATS AND
THE GATT 1994Elsa Octaria Geraryn Panjaitan
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Abstract

This paper analyzes the consistency of selected regulatory measures governing digital services, audiovisual content, investment screening, and cross-border data flows with the legal framework of the World Trade Organization (WTO). The purpose of this study is to assess whether measures that may prima facie be inconsistent with obligations under the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade 1994 (GATT 1994) can be justified under the relevant general exceptions. The research employs a normative legal approach based on doctrinal analysis, treaty interpretation, and a review of WTO jurisprudence, focusing on Article XIV(a) and Article XIV(c)(ii) of the GATS and Article XX(d) of the GATT 1994. The analysis applies the necessity test, examines the requirement of securing compliance with laws or regulations, and evaluates conformity with the respective chapeau provisions. The results indicate that, although the measures may affect market access and trade flows, they can be justified where they pursue legitimate public policy objectives, contribute materially to those objectives, are not more trade-restrictive than necessary, and are applied in a transparent and non-arbitrary manner. The paper concludes that properly designed and proportionate regulatory measures may fall within the scope of the WTO general exceptions and remain consistent with WTO law.

Keywords: WTO Law; GATS; GATT 1994; General Exceptions; Digital Regulation

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Introduction

In recent years, states have progressively implemented a variety of regulatory measures designed to oversee digital services, audiovisual content, investment activities, and cross-border data transmissions.¹ These measures are frequently implemented within a comprehensive regulatory framework aimed at achieving legitimate public policy goals, including the promotion of domestic cultural industries, the protection of personal data, and the assurance of effective regulatory supervision over rapidly evolving digital markets.² Rather than operating in isolation, such measures are frequently designed to function cumulatively, forming an integrated regulatory scheme applicable to foreign and domestic service suppliers alike.

¹ OECD, 'Case Studies on the Regulatory Challenges Raised by Innovation and the Regulatory Responses, [47].

² *Ibid.*

However, when multiple measures are applied simultaneously, their combined effects may give rise to concerns under international trade law, particularly under the General Agreement on Trade in Services (“GATS”) and, where relevant, the General Agreement on Tariffs and Trade 1994 (“GATT 1994”). Measures concerning local content requirements, investment screening, and data localization may impact market access, national treatment, and the free movement of services and products, potentially leading to inconsistencies with Members’ substantive obligations.³ Consequently, an evaluation of such measures must extend beyond their individual design to encompass their overall framework, functionality, and interrelationships.

This paper specifically examines selected regulatory measures that, while potentially inconsistent with certain obligations under the GATS and the GATT 1994, may nevertheless be justified under the WTO’s general exception provisions. In particular, the analysis focuses on the applicability of Article XIV(a) of the GATS, which permits measures necessary to protect public morals or to maintain public order; Article XIV(c)(ii) of the GATS, which allows measures necessary to secure compliance with laws or regulations relating to the protection of personal data and privacy; and Article XX(d) of the GATT 1994, which provides an exception for measures necessary to secure compliance with laws or regulations not inconsistent with the Agreement. By assessing the scope, requirements, and limitations of these provisions, this paper seeks to determine whether the measures at issue can be legally justified within the WTO framework, both individually and as part of an integrated regulatory scheme.

Justification under Article XIV of the GATS

1. Article XIV(a) of the GATS

Article XIV(a) of the GATS provides an exception for measures that are necessary to protect public morals or to maintain public order. In order to rely on this provision, the invoking party bears the burden of proof to demonstrate that the contested measure satisfies two cumulative elements: (i) the measure must pursue the objective of protecting “public morals” or maintaining “public order”; and (ii) the measure must be “necessary” to achieve that objective, within the meaning of Article XIV(a) of the GATS.⁴

First, to protect “public morals” or maintaining “public order.” Public moral is defined as “standards or right and wrong conduct maintained by or on behalf of a community or nation,” and public order is defined as “fundamental interests of a society, as reflected in public policy or law.”⁵ However, the standards may vary “according to their systems and scales of values.”⁶

Second, the measure is “necessary” as the interests or values pursued are of utmost importance, the policy contributes to the objectives pursued, and the policy’s restrictive impact in international commerce passes the “weighing and balancing” test.⁷

2. Article XIV(c)(ii) of the GATS

Article XIV(c)(ii) of the GATS provides an exception for measures that are necessary to secure compliance with laws or regulations that are not inconsistent with the GATS. In order to rely on this provision, the invoking party bears the burden of proof to demonstrate that the contested measures satisfy two cumulative elements: (i) the measures must be designed to

³ Holger P. Hestermeyer and Laura Nielsen, ‘The Legality of Local Content Measures under WTO Law,’ *Journal of World Trade*, 2014, [554].

⁴ General Agreement on Trade in Services (“GATS”), Art. XIV(a).

⁵ PR, US-Gambling, [6.467].

⁶ *Ibid.*

⁷ ABR, Korea-Various Measures on Beef, [161].

secure compliance with laws or regulations that are themselves not inconsistent with the GATS and (ii) the measures must be “necessary” to secure such compliance, within the meaning of Article XIV(c)(ii) of the GATS.⁸

The policies are “necessary to secure compliance” with laws or regulations. The requirement of “to secure compliance” refers to the existence of a genuine and close relationship between the contested measure and the enforcement of specific laws or regulations that are not inconsistent with the GATS.⁹ A measure satisfies this criterion where it is designed and structured to ensure observance of such laws or regulations, rather than merely pursuing the same policy objective in the abstract.¹⁰ The focus of the analysis lies on the design, architecture, and operation of the measure, which must reveal that its primary function is to facilitate, reinforce, or ensure effective compliance with the underlying legal obligations.¹¹

3. Chapeau of the GATS

Measures justified under Article XIV(a) and Article XIV(c)(ii) of the GATS must also comply with the requirements of the chapeau of Article XIV. In this regard, the policies at issue are consistent with the chapeau for three reasons: (i) the policies do not discriminate “between countries where the like conditions prevail,” and even if there is discrimination, (ii) it is not “arbitrary or unjustifiable.” Further, (iii) the policies are not apt as a “disguised restriction on trade in services.”¹²

First, the policies do not discriminate “between countries where like conditions prevail,” as the relevant regulatory conditions differ across countries with respect to cultural protection frameworks and data protection regimes.¹³

Second, the policies do not amount to “arbitrary or unjustifiable discrimination,” as they bear a rational relationship to their legitimate regulatory objectives, notwithstanding any incidental economic effects.¹⁴

Third, the policies do not constitute a “disguised restriction on trade in services,” as their design, application, and transparency demonstrate a bona fide regulatory purpose, and any incidental trade-restrictive effects arise as a natural consequence of legitimate regulation rather than from protectionist intent or concealed objectives.¹⁵

Justification under Article XX(d) of the GATT 1994

Article XX(d) of the GATT 1994 provides an exception for measures that are necessary to secure compliance with laws or regulations that are not inconsistent with the GATT 1994. In order to invoke this provision, the invoking party bears the burden of proof to establish that the contested measures satisfy two cumulative requirements. First, the measures must be designed “to secure compliance” with domestic laws or regulations within the meaning of Article XX(d).

⁸ General Agreement on Trade in Services (“GATS”), Art. XIV(c)(ii).

⁹ PR, Argentina—Financial Services, [7.682].

¹⁰ PR, EU—Energy Package, [7.1215].

¹¹ *Ibid.*, [7.1225].

¹² ABR, US—Shrimp, [184]; PR, Argentina—Financial Services, [7.745], [7.456]; PR, EU—Energy Package, [7.1241].

¹³ ABR, EC—Seal Products, [5.300].

¹⁴ PR, Brazil—Retreaded Tyres, [7.262]; ABR, EC—Seal Products, [5.321].

¹⁵ PR, EC—Asbestos, [8.239].

Second, the measures must be “necessary” to secure such compliance, taking into account the relationship between the measures and the enforcement of the relevant laws or regulations.¹⁶

First, the alleged measures are adopted to secure compliance with domestic laws or regulations within the meaning of Article XX(d) of the GATT 1994. The relevant laws or regulations form part of the Member’s domestic legal system and are legally enforceable by the competent authorities.¹⁷ The design, structure, and expected operation of the measures demonstrate a close relationship with the objective of ensuring effective enforcement of these laws or regulations. In particular, the measures are capable of inducing compliance and addressing violations through regulatory oversight and enforcement actions.¹⁸ Accordingly, the measures are intended to secure compliance with domestic laws or regulations, thereby satisfying the first requirement of Article XX(d) of the GATT 1994.

Second, the alleged measures are “necessary” within the meaning of Article XX(d) of the GATT 1994, as demonstrated by a holistic weighing and balancing analysis.¹⁹ Securing compliance with domestic laws or regulations constitutes an important value or interest for the regulating Member, particularly in sectors that are dynamic and economically significant.²⁰ The measures make a material contribution to this objective, as their design and operation show a genuine relationship with the enforcement of the relevant legal framework.²¹ Moreover, the measures are not unduly trade-restrictive when assessed in context, as they are less restrictive than more severe alternatives and are calibrated to ensure effective compliance. Finally, no reasonably available, less WTO-inconsistent alternative measure has been identified that would achieve an equivalent level of protection.²²

Third, the alleged measures comply with the chapeau of Article XX of the GATT 1994, as they do not discriminate between countries where the same conditions prevail, nor do they amount to arbitrary or unjustifiable discrimination.²³ The measures are rationally connected to legitimate regulatory objectives, applied transparently, and accompanied by procedural safeguards.²⁴ Any incidental advantages for domestic operators result from lawful enforcement rather than protectionist intent. Accordingly, the measures do not constitute a disguised restriction on international trade.

Conclusion

In conclusion, this paper finds that regulatory measures affecting digital services, audiovisual content, investment screening, and cross-border data flows, while potentially inconsistent with certain obligations under the GATS and the GATT 1994, may be justified under the WTO general exception provisions. When such measures pursue legitimate public policy objectives, demonstrate a genuine and material contribution to those objectives, are not more trade-restrictive than necessary, and are applied in a transparent and non-discriminatory manner, they can fall within the scope of Article XIV(a) and Article XIV(c)(ii) of the GATS as well as Article XX(d) of the GATT 1994. Accordingly, the WTO framework preserves Members’

¹⁶ General Agreement on Tariffs and Trade 1994, Art. XX(d).

¹⁷ PR, Indonesia—Raw Materials, [7.186-7.192].

¹⁸ PR, Indonesia—Raw Materials [7.238].

¹⁹ ABR, Korea—Various Measures on Beef, [161].

²⁰ ABR, Colombia—Textiles, [5.71].

²¹ ABR, Brazil—Retreaded Tyres, [145].

²² ABR, Korea—Various Measures on Beef, [178].

²³ PR, Brazil—Retreaded Tyres, [7.262]; ABR, EC—Seal Products, [5.321].

²⁴ ABR, US—Shrimp, [183].

regulatory autonomy to address public morals, public order, data protection, and compliance with domestic laws, provided that such measures are proportionate and consistent with the requirements of the relevant chapeau provisions.

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