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Working Party on Domestic Regulation

"NECESSITY TESTS" IN THE WTO

Note by the Secretariat[1]

1. At the request of the Working Party on Domestic Regulation, this Note updates and expands upon the Secretariat's previous note on necessity,[2] which focused on the role of necessity tests in existing WTO agreements, especially the *Agreement on Technical Barriers to Trade* (TBT) and the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS). This Note complements the earlier Note by reviewing developments in WTO jurisprudence.

2. The Note begins with a background section on the concept of a "necessity test", and its relation to GATS Article VI:4. It then examines central issues relating to necessity tests as they have arisen in WTO jurisprudence.

I. BACKGROUND

A "NECESSITY TESTS" IN WTO AGREEMENTS

3. WTO agreements contain a number of provisions, which in whole or in part are commonly referred to as "necessity tests". Notably, these include Articles XX and XI of the GATT; GATS Articles XIV and VI:4, paragraph 2(d) of Article XII and paragraph 5(e) of the Annex on Telecommunications; Articles 2.2 and 2.5 of the TBT Agreement; Articles 2.2 and 5.6 of the SPS Agreement; Articles 3.2, 8.1 and 27.2 of the TRIPS Agreement; and Article 23.2 of the Agreement on Government Procurement. For ease of reference, the texts of these provisions are annexed to this Note. Since several of them have not yet been subject to dispute settlement procedures, no jurisprudence has been developed on them to date.

4. Necessity tests establish the WTO consistency of a measure based on whether the measure is "necessary" to achieve certain policy objectives. These tests reflect the balance in WTO agreements between two important goals: preserving the freedom of Members to set and achieve regulatory objectives through measures of their own choosing, and discouraging Members from adopting or maintaining measures that unduly restrict trade. Necessity tests typically achieve this balance by requiring that measures, which restrict trade in some way (including by violating obligations of an agreement) are permissible only if they are "necessary" to achieve the Member's policy objective. In so doing, the necessity tests confirm the right of Members to regulate and to pursue their policy objectives. It should be stressed as noted below that, in spite of similarities between the wording of necessity tests in different WTO provisions, an interpretation developed in the context of one case cannot be automatically transposable to other provisions. Each provision would have to be interpreted in the light of the object and purpose of the Agreement of which it is part.

[1] This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

[2] *Application of the Necessity Test: Issues for Consideration* (Job No. 5929, dated 8 October 1999).

5. Necessity tests can be viewed as containing three main elements: first, the *measure* that is subject to the test; second, the *objective* which the measure seeks to achieve; and, third, the link of *necessity* between the measure and the objective. An examination of the texts of the various "necessity tests" allows certain observations to be made:

(a) With respect to the *measures* subject to "necessity tests", some tests cover *all* measures within the scope of the relevant Agreement (e.g. GATT Article XX or GATS Article XIV), while others are limited to some subset of the agreement (e.g. GATT Article XI or GATS Article VI:4).

(b) With respect to the policy *objectives* which may relate to a necessity test, some provisions contain a *closed* list (e.g. GATT Article XX and GATS Article XIV), while others contain an *open* illustrative list of "legitimate objectives" (e.g. TBT Article 2.2 and the *Accountancy Disciplines,*[3] Section I, paragraph 2).

(c) The concept of necessity of a measure to achieve the policy objective is expressed in some provisions by the term "necessary"; in others it has been stated in different ways, such as the term "not more trade restrictive than required".[4] Also, the conditions and criteria embodied in necessity tests vary, for instance the requirement in SPS Article 5.6 that measures be "reasonably available taking into account technical and economic feasibility", or the requirement in the chapeau of GATT Article XX that measures not "constitute a means of arbitrary of unjustifiable discrimination between countries".

6. These three main elements of necessity tests combine to create either an *obligation* (as in TBT Article 2.2, SPS Article 2.2 and the Accountancy Disciplines), or to frame an *exception to an obligation* (as in GATT Article XX, and GATS Article XIV). In the latter case, a necessity test may be part of a *particular* exception to the provision in which it appears (as in GATT Article XI:2(c) or paragraph 5(e) of the GATS Annex on Telecommunications), or it may be part of a *general* exception applicable to all measures within the scope of the agreement (as in GATT Article XX or GATS Article XIV).

7. Necessity tests in *exception* provisions are different in at least two respects from those in obligations. First, necessity tests in exception provisions appear to be associated with a finite set of policy objectives that are more limited and fundamental in nature (such as public morality, public health, and public safety), while those in obligation provisions may be associated with an open illustrative list of objectives.[5] Second, in dispute settlement proceedings the initial burden of proof in relation to necessity tests in exception provisions is on the party who has invoked that provision, while in the case of necessity tests in obligation provisions the burden of proof is on the complaining party. In all cases, the necessity tests can also be viewed as an expression of the right of Members to adopt TBT and SPS measures and other forms of domestic regulation, subject to ensuring that those measures comply with the necessity criteria as identified in the WTO provisions and the jurisprudence.

B. GATS ARTICLE VI:4

8. Article VI:4 of the GATS does not impose a direct necessity test on Members. Rather, with respect to the measures within its scope (qualification requirements and procedures, technical

[3] *Disciplines on Domestic Regulation in the Accountancy Sector* (S/L/64). The *Accountancy Disciplines* were adopted by the Council for Trade in Services on 14 December 1998. They are not currently legally in effect, and are to be integrated into the GATS, together with any other disciplines which have been developed, before the end of the current services negotiations. (See also paragraph 10).

[4] As found in Article 5.6 of the SPS Agreement and the Accountancy Disciplines.

[5] In this respect, compare the policy objectives in GATT Article XX and GATS Article XIV with those in Article 2.2 of the TBT Agreement and Section I, paragraph 2, of the *Accountancy Disciplines*.

standards, licensing requirements and procedures) the provision calls upon Members to *negotiate* any needed disciplines to ensure that such measures do not constitute unnecessary barriers to trade. Article VI:4 states:

> *With a view to ensuring* that measures relating to qualification requirements and procedures, technical standards and licensing requirements *do not constitute unnecessary barriers to trade in services*, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) *not more burdensome than necessary* to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. (emphasis added)

9. The first disciplines developed under the mandate of Article VI:4, the *Accountancy Disciplines*, contain a necessity test in the form of an obligation. The scope of the measures subject to the test is expressly limited to measures relating to licensing, technical standards and qualifications that are not subject to scheduling under Articles XVI (Market Access) or XVII (National Treatment) of the GATS. Section I, paragraph 2 (General Provisions) states:

> Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, *Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective*. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.[6] (emphasis added)

II. ISSUES ARISING IN WTO JURISPRUDENCE

10. Panels and the Appellate Body have made rulings on necessity tests in the GATT 1994, the SPS Agreement, and the TBT Agreement. Some of these rulings raise issues that are relevant to the concept of a necessity test referred to in Article VI:4 of the GATS. This Note adopts a thematic approach in reviewing these issues. It first addresses legal rulings relating to the *objectives* of the measure, then the closely related issue of the *level of attainment* that the Member seeks to achieve with the measure. It then examines rulings related to the *necessity* of the measure. Finally, the Note considers legal rulings on the *burden of proof*.

11. Despite a similarity of wording between provisions in WTO agreements containing necessity tests, interpretations developed in the context of a specific case and a specific provision cannot be assumed to be transposable automatically to other provisions. In keeping with the customary rules of interpretation in public international law, the ordinary meaning of the terms of each provision must be read in the context, and in the light of the object and purpose, of the agreement concerned.

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[6] *Disciplines on Domestic Regulation in the Accountancy Sector* (S/L/64).

A. OBJECTIVES OF THE MEASURE

12. Under GATT Article XX, panels and the Appellate Body have consistently ruled that it is not the necessity of the *policy objective* that is to be examined, but the necessity of the *measure* to achieve the intended policy objective. In the *US – Gasoline* case, the Appellate Body stated:

> It is of some importance that the Appellate Body point out what [the Appellate Body's finding] does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests – including the protection of human health, as well as the conservation of exhaustible natural resources – to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.[7] [footnote in original text omitted]

13. Unlike GATT Article XX, the necessity test in Article 2.2 of the TBT Agreement contains an open, illustrative list characterized as "legitimate objectives". The Panel in the *EC-Sardines* case, in analyzing the phrase "legitimate objectives pursued" in Article 2.4,[8] stated:

> The next question we address concerns the phrase legitimate objectives pursued". We first consider that the "legitimate objectives" referred to in Article 2.4 must be interpreted in the context of Article 2.2, which lists examples of objectives which are considered legitimate under the TBT Agreement. As indicated by the phrase "*inter alia*", this list is illustrative and allows for the possibility that other objectives, which are not explicitly mentioned, may very well be legitimate under the TBT Agreement.[9]

14. In further examining the meaning of a "legitimate objective" under Article 2.2, the Panel looked at the Preamble of the TBT Agreement, which expresses the desire that "technical regulations and standards … do not create *unnecessary obstacles* to trade" (emphasis added). The Panel noted that the Preamble further states;

> no country should be prevented from taking measures to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, *at the levels it considers appropriate,* subject to the requirement that they are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail or a *disguised restriction on international trade* ... (emphasis added)

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[7] *United States – Standards for Reformulated and Conventional Gasoline* (hereinafter *US – Gasoline)*, Appellate Body Report, WT/DS/2/AB/R, page 28.

[8] Article 2.4 of the TBT Agreement states: "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems".

[9] *EC – Sardines*, Panel Report, WT/DS/231/R, paragraph 7.118.

15. The Panel concluded that this preambular language, and the wording of Article 2.2, "affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[10]

16. At the same time, the Panel recognized that the TBT Agreement imposes some limits on the regulatory autonomy of Members with respect to technical regulations. Members could not "create obstacles to trade which are unnecessary or which, in their application, amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade." The balance was expressed by the Panel in terms of a different degree of deference with respect to domestic policy objectives and the *means* employed to achieve them:

> Thus, the TBT Agreement, like the GATT 1994, whose objective it is to further, accords a degree of *deference* with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, shows *less deference* to the means which Members choose to employ to achieve their domestic policy goals. (emphasis added)

17. The Panel then recalled that, under the TBT Agreement, the respondent must "advance the objectives" of its technical regulation, which it considers legitimate. The Panel elaborates:

> Only the Member pursuing the legitimate objective is in a position to elaborate the objective it is trying to accomplish. Panels are, however, required to determine the legitimacy of those objectives. We note in this regard that the panel in *Canada — Pharmaceuticals Patents*, in defining the term "legitimate interests", stated that it must be defined "as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms [11].[12]

18. The Appellate Body upheld the findings of the Panel in *EC – Sardine,* with respect to Article 2.4. The Appellate Body stated notably that "given the use of the term '*inter alia*' in Article 2.2, the objectives covered by the term 'legitimate objectives' in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2."

B. LEVEL OF ATTAINMENT

19. Closely related to the issue of the permissible range of policy objectives on which a necessity test can be based, is the question of the *level of attainment* chosen by a Member with respect to those objectives. The level of attainment of the objective is often referred to, especially in the context of the SPS agreement, as "level of protection".

20. Under Article XX(d) of the GATT, with respect to enforcement measures, the Appellate Body in the *Korea – Beef* case confirmed the right of Korea to choose the *level* of enforcement of its Competition Act that it desired.[13] The Appellate Body also said that the choice of a measure can indicate the objective sought by the measure, as well as the *level* of protection which the measure

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[10] *EC – Sardines*, Panel Report, WT/DS/231/R, paragraph 7.120.

[11] Panel Report, *Canada — Patent Protection of Pharmaceutical* Products ("*Canada — Pharmaceuticals*"), WT/DS114/R, adopted 7 April 2000, paragraph 7.69. Similarly, the panel in *US — Section 110(5) Copyright Act* stated that the term has to be considered from a "normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights". Panel Report, *United States — Section 110(5) of the US Copyright Act* ("*US — Section 110(5) Copyright Act*"), WT/DS160/R, adopted 27 July 2000, paragraph 6.224.

[12] *EC – Sardines*, Panel Report, WT/DS/231/R, paragraphs 7.121.

[13] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (hereinafter *Korea-Beef*), WT/DS/161,169/AB/R) paragraph 180.

intends to achieve. In *Korea – Beef,* Korea invoked paragraph (d) of Article XX as justification for measures affecting the importation of beef, that were found to be inconsistent with GATT Article III:4. The Appellate Body concluded:

> We think it unlikely that Korea intended to establish a level of protection that *totally eliminates* fraud with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports. Consequently, we assume that in effect Korea intended to *reduce considerably* the number of cases of fraud occurring with respect to the origin of beef sold by retailers.[14]

21. Under Article XX(b) of the GATT, with respect to measures for the protection of human health, the Appellate Body stated in *EC – Asbestos* that each WTO Member had the "right to determine the level of protection of health that [it] consider[s] appropriate in a given situation".[15] Accordingly, the Appellate Body did not question France's goal in that case of reducing the spread of asbestos-related health risks to zero (see also paragraph 26 below).

22. Under the SPS Agreement, the Appellate Body has pointed in the *Australia – Salmon* case to the important difference between the "measure" and the "level of protection", thereby implying that the same policy or objective can serve as the basis for different types of measures, while the necessity tests focus on whether the chosen measure is more restrictive than necessary to fulfil that legitimate policy or objective. The Appellate Body asserted that:

> The "appropriate level of protection" established by a Member and the "SPS measure" have to be clearly distinguished.[footnote omitted] They are not one and the same thing. The first is an *objective*, the second is an *instrument* chosen to attain or implement that objective.[16]

23. In the same case, the Appellate Body reaffirmed that the determination of the appropriate level of protection is the right of the Member concerned:

> The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as 'the level of protection deemed appropriate by the Member establishing a sanitary ... measure', is a prerogative of the Member concerned and not of a Panel or of the Appellate Body.[17]

24. The Appellate Body added that Members are not precluded from choosing a "zero risk" level of protection:

> As stated in our Report in *European Communities – Hormones*, the "risk" evaluated in a risk assessment must be an ascertainable risk; theoretical uncertainty is "not the kind of risk which, under Article 5.1, is to be assessed." [footnote omitted] This does not mean, however, that a Member cannot determine its own appropriate level of protection to be "zero risk".[18]

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[14] *Korea –Beef*, Appellate Body Report, WT/DS/161,169/AB/R) paragraph 178.

[15] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (hereinafter *EC – Asbestos)*, Appellate Body Report, WT/DS/135/AB/R, paragraph 168.

[16] *Australia – Measures Affecting Importation of Salmon* (hereinafter *Australia – Salmon)*, Appellate Body Report, WT/DS18/AB/R, paragraph 200.

[17] *Australia – Salmon*, Appellate Body Report, WT/DS18/AB/R, paragraph 199.

[18] *Australia – Salmon*, Appellate Body Report, WT/DS18/AB/R, paragraph 125, page 38.

25. The Appellate Body also emphasized the importance for a Member to *determine clearly* the appropriate level of protection (and by possible implication, to determine clearly the objective to be achieved by measures covered under GATS Article VI:4):

> We recognize that the *SPS Agreement* does not contain an *explicit* provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the *SPS Agreement*, in particular, in paragraph 3 of Annex B, Article 4.1[19], Article 5.4 and Article 5.6 of the *SPS Agreement*. [20] With regard to Article 5.6, for example, we note that it would clearly be impossible to examine whether alternative SPS measures achieve the appropriate level of protection if the importing Member were not required to determine its appropriate level of protection.
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> We thus believe that the *SPS Agreement* contains an implicit obligation to determine the appropriate level of protection. We do not believe that there is an obligation to determine the appropriate level of protection in quantitative terms. This does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement,* such as Article 5.6, becomes impossible. It would obviously be wrong to interpret the *SPS Agreement* in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement.[21]

26. The Appellate Body then recognized that, where a Member has not determined, or determined with insufficient precision, the appropriate level of protection, it

> ... may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied. Otherwise, a Member's failure to comply with the implicit obligation to determine its appropriate level of protection – with sufficient precision – would allow it to escape from its obligations under this Agreement and, in particular, its obligations under Articles 5.5 and 5.6.[22]

C. NECESSITY OF THE MEASURE

27. The meaning of the term "necessary" has given rise to an extensive jurisprudence, especially in the context of disputes under Article XX of GATT 1947 and GATT 1994. Under Article XX of GATT 1947, a panel initially tied the condition of necessity to an examination of whether a satisfactory and effective alternative existed.[23] The classic formulation of the necessity test under GATT 1947 was made by the Panel in *United States – Section 337*, which examined whether a measure could be justified as an enforcement measure under paragraph (d) of Article XX. The Panel concluded that:

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not

[19] Reasonable questions from interested Members within the meaning of paragraph 3 of Annex B can arise, in particular, with respect to the application of Article 4 of the *SPS Agreement*. Articles 4.1 and 4.2 imply, in our view, a clear obligation of the importing Member to determine its appropriate level of protection.

[20] Furthermore, it could be argued that an implicit obligation for a Member to determine the appropriate level of protection results also from Article 5.8 and Article 12.4 of the *SPS Agreement*.

[21] *Australia – Salmon,* Appellate Body Report, WT/DS18/AB/R, paragraphs 205-206.

[22] *Australia – Salmon*, Appellate Body Report, WT/DS18/AB/R, paragraphs 207.

[23] *United States – Importation of Certain Automotive Spring Assemblies,* BISD 30S/ 107-128 (L/5333), paragraph 58.

> inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[24]

28. In the *Thailand – Cigarettes* case, the Panel examined an import restriction on cigarettes which Thailand sought to justify as a measure to protect human health under paragraph (b) of GATT Article XX. The Panel affirmed the *US – Section 337* panel's approach to the meaning of the term "necessary", even though the cases involved different paragraphs of Article XX. The Panel saw no reason why the same interpretation could not be applied with respect to the other provisions of Article XX where the term "necessary" was used, given that it served the same objective – allowing the "contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable".[25]

29. The basic interpretation by GATT 1947 panels of the term "necessary" under Article XX of GATT was accepted by a WTO panel in the *US – Gasoline* case with respect to claims under paragraphs (b) and (d) of Article XX. However, the rulings by the Panel on these paragraphs were not examined by the Appellate Body, since under Article XX only the Panel's ruling with respect to the conservation of natural resources under paragraph (g) was appealed.

30. In the *Korea – Beef case*, however, the criteria established by previous Panels for assessing the necessity of a measure were significantly supplemented. The Appellate Body, in its report, revisited the definition of the word "necessary", applying the interpretation rules in the *Vienna Convention.*[26] The Appellate Body looked first at the ordinary dictionary meaning of the term "necessary", finding that it "normally denotes something "that cannot be dispensed with or done without, requisite, essential, needful".[27] However, the Appellate Body noted that a standard law dictionary cautions that:

> [t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity[28]. [29]

31. The Appellate Body deduced that, in the context of Article XX(d), the term "necessary" referred to a "range of degrees of necessity." It stated:

> As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum,

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[24] *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345-402 (*L/6439)*, paragraph 5.26.

[25] *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200 (DS10/R), paragraph 74.

[26] See Vienna Convention on the Law of Treaties, Article 31 and Article 32.

[27] *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, page 1895.

[28] *Black's Law Dictionary*, (West Publishing, 1995), page 1029.

[29] *Korea –Beef,* Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, paragraph 160.

> located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to.[30],[31]

32. The Appellate Body then said that every appraisal of whether a measure was "necessary" would involve a process of "weighing and balancing a series of factors". The factors it referred to were *legal* (such as the context in which "necessary" is found within an Article giving effect to its object and purpose) and *factual* (such as the reasonability, value and effect of the measure). The Appellate Body summarized the necessity test under Article XX(d) as follows:

> In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the *enforcement* of the law or regulation at issue, the importance of the *common interests or values* protected by that law or regulation, and the accompanying impact of the law or regulation on *imports or exports*.[32] (emphasis added)

33. On the facts of the *Korea – Beef* case, the Panel and Appellate Body found that, *inter alia*, not only had other means been available to Korea which were consistent with its WTO obligations, but these measures had been available and used by Korea in relation to other products. The Appellate Body added further that the measure could not be justified, as it was "a disproportionate measure not necessary to secure compliance with Korean law against deceptive practices".[33]

34. In the *EC – Asbestos* case, the Appellate Body applied the reasoning in *Korea – Beef* to the justification of a measure to protect human health under paragraph (b) of Article XX of the GATT. In examining the extent to which the measure at issue contributed to the realization of the health objective, and the importance of the common values or interests pursued, the Appellate Body stated:

> We indicated in *Korea – Beef* that one aspect of the "weighing and balancing process … comprehended in the determination of whether a WTO-consistent alternative measure" is reasonably available is the extent to which the alternative measure "contributes to the realization of the end pursued". [footnote omitted] In addition, we observed, in that case, that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. [footnote omitted] In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.[34]

35. In *EC – Asbestos*, other factors that enter into the assessment of whether an alternative measure was "reasonably available" were highlighted. These factors included cost, technical difficulties and lack of expertise – aspects of administrative burden, but not exclusively related to it.

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[30] We recall that we have twice interpreted Article XX(g), which requires a measure "*relating* to the conservation of exhaustible natural resources". (*emphasis added*). This requirement is more flexible textually than the "necessity" requirement found in Article XX(d). We note that, under the more flexible "*relating to*" standard of Article XX(g), we accepted in *United States – Gasoline* a measure because it presented a "*substantial* relationship", (*emphasis added*) i.e., *a close and genuine* relationship of ends and means, with the conservation of clean air. *Supra*, footnote 98, page19. In *United States – Shrimp* we accepted a measure because it was "*reasonably related*" to the protection and conservation of sea turtles. *Supra*, footnote 98, at paragraph 141.

[31] *Korea –Beef,* Appellate Body Report ,WT/DS161/AB/R, WT/DS169/AB/R, paragraphs 160-161.

[32] *Korea –Beef,* Appellate Body Report ,WT/DS161/AB/R, WT/DS169/AB/R, paragraph 164.

[33] *Korea –Beef,* Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, paragraph 179.

[34] *EC – Asbestos*, Appellate Body Report, WT/DS/135/AB/R, paragraph 172.

The EC argued, for example, that its total ban on asbestos and asbestos products could be justified by the "numerous, particularly legal, obstacles which confront the victims of current exposure seeking redress in the courts".[35] The Panel noted:

> We consider that the existence of a reasonably available measure must be assessed in the light of the economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies. Thus, the Panel considers that it is legitimate to expect a country such as France with advanced labour legislation and specialized administrative services to deploy administrative resources proportionate to its public health objectives and to be prepared to incur the necessary expenditure.[36]

36. Previous panels examining Article XX of the GATT have also given due consideration to the same factors. In the *Korea – Beef* , the Appellate Body made a similar finding that "Korea has not demonstrated that the costs would be too high".[37] In *US–Gasoline*, the Panel held that, when determining whether an alternative measure was reasonably available, an alternative measure did not cease to be "reasonably available" simply because the alternative measure involved administrative difficulties for a Member.[38]

37. With respect to the SPS Agreement, some of the key provisions have been interpreted in the context of disputes, including Article 5.6 (which contains a necessity test). It is useful to recall that the notion of a "reasonably available alternative measure", which in the context of Article XX has been developed in the jurisprudence, is expressly contained in the footnote to Article 5.6. As a result, the text of this necessity test itself provides guidance on what makes a measure "more trade-restrictive than required".

38. In *Australia - Salmon*, with respect to the structure of Article 5.6, the Appellate Body identified three separate elements and found that they applied cumulatively:

> We agree with the Panel that Article 5.6 and, in particular, the footnote to this provision, clearly provides a three-pronged test to establish a violation of Article 5.6. As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which:
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> (1) is reasonably available taking into account technical and economic feasibility;
>
> (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and
>
> (3) is significantly less restrictive to trade than the SPS measure contested.
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> These three elements are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met. If any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic feasibility,

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[35] *EC – Asbestos*, Panel Report WT/DS/135/R, paragraph 8.196.

[36] *EC – Asbestos*, Panel Report, WT/DS/135/R, paragraph 8.196.

[37] *Korea –Beef,* Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, paragraph 179.

[38] EC – Asbestos , Appellate Body Report, WT/DS/135/AB/R , paragraph 196, referring to the Panel Report, *United States – Gasoline*, WT/DS2/R, paragraphs 6.26 and 6.28.

> *or* if the alternative measure does not achieve the Member's appropriate level of sanitary or phytosanitary protection, *or* if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6.[39]

39. With regard to the "reasonable availability" element of the alternative measure, the Appellate Body in the same case agreed with the findings of the Panel, observing:

> On the first element of the test under Article 5.6, i.e., whether there is an alternative SPS measure which is "reasonably available, taking into account technical and economic feasibility", the Panel noted that the four options were described in the 1996 Final Report [an Australian Government Report] as options "which merit consideration", and found that "this implies that the 1996 Final Report put forward the four alternatives … as technically or economically feasible policy options". The Panel, therefore, concluded that the first element of the test under Article 5.6 is met. [footnote omitted][40]

D. BURDEN OF PROOF IN DISPUTE SETTLEMENT PROCEEDINGS

40. The Appellate Body in *US – Wool Shirts and Blouses* said that the burden of proof in WTO dispute settlement rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[41]

41. With regard to the exceptions contained in Article XX, the Appellate Body also noted in *US – Wool Shirts and Blouses* that Article XX contains "limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves".[42] Article XX is therefore an example of provisions, which are in the nature of "affirmative" defence, and the Appellate Body noted further that "it is only reasonable that the burden of establishing such a defence should rest on the party asserting it".[43]

42. Typically, general exceptions provisions are invoked by the party complained against, and considered by the Panel only once it has determined a violation of some other provision. In other words, in the context of a measure argued to be justified under Article XX, the complainant's task will be in the first instance to make a *prima facie* case of violation, while the Member maintaining the measure, as the respondent, will bear the burden of demonstrating that the measure can be justified under Article XX.[44]

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[39] *Australia – Salmon*, Appellate Body Report, WT/DS18/AB/R, paragraph 194.

[40] *Australia – Salmon*, Appellate Body Report, WT/DS18/AB/R, paragraph 183.

[41] Secretariat Background Note, *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g)* (WT/CTE/W/203, 8 March 2002), page 5. See also *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (hereinafter *US – Wool Shirts and Blouses*), Appellate Body Report, adopted on 23 May 1997, WT/DS/33/AB/R, *in* WTO, *Dispute Settlement Reports 1997* (hereinafter *DSR 1997)*, volume 1, Geneva, 2000, page 335. This ruling has been applied by the Appellate Body in *inter alia*: *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R adopted on 19 December 1997, paragraphs 73-75; *European Communities Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, adopted on 16 January 1998, paragraph 98; *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted on 23 August 1999, paragraph 44; and by the Panel in *EC – Asbestos*, paragraph 8.177.

[42] *US – Wool Shirts and Blouses*, Appellate Body Report, WT/DS33/AB/R, page 16.

[43] *US – Wool Shirts and Blouses*, Appellate Body Report, WT/DS33/AB/R, page 16.

[44] CTE/W/203, paragraph 7, page 5.

43. The Appellate Body also stated, in *US – Gasoline*, that in order to succeed in a defence under Article XX, two elements must be considered (in that order): first, whether the measure at issue falls within the scope of one of the subparagraphs and, second, whether it complies with the introductory clause or "chapeau".[45] The Appellate Body indicated that the second element of the analysis – the burden of showing that a measure complies with the requirements of the introductory clause of Article XX – falls on the defending party, even after that party has established that the measure qualifies under one of the subheadings of Article XX. The Appellate Body stated:

> The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.[46]

44. With respect to the first element of an analysis under Article XX of the GATT, the Appellate Body stated in *Korea–Beef* that the party invoking paragraph (d) of GATT Article XX had to demonstrate the following:

> For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met. [footnote omitted] [47]

45. With regard to burden of proof under the necessity tests in the SPS Agreement (and, by implication, perhaps also with regard to the necessity tests under the TBT Agreement and any disciplines which may be developed under GATS Article VI:4), the Appellate Body clarified in the *EC – Hormones* case that:

> The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.[48]

46. In *EC – Hormones*, the Appellate Body reversed a ruling by the Panel that the Appellate Body described as "a general, unqualified, interpretative ruling that the SPS Agreement allocates the 'evidentiary burden' to the Member imposing an SPS measure".[49] The Appellate Body stated that it did "not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are 'applied only to the extent

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[45] US – Gasoline, Appellate Body Report, WT/DS/2/AB/R, page 22.

[46] US – Gasoline, Appellate Body Report, WT/DS/2/AB/R, pages 22-23. Also see *WTO Analytical Index*, Vol. 1, page 340-342.

[47] *Korea – Beef*, Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, paragraph 157.

[48] *EC – Hormones*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, paragraph 98. In this context, it is worth recalling that the necessity tests in the SPS Agreement identified above, in particular Article 2.3, are not formulated as exceptions as is the case for GATT Article XX.

[49] *EC – Hormones*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, paragraph 99.

necessary to protect human, animal or plant life or health …' [footnote omitted] and the allocation of burden of proof in a dispute settlement proceeding."[50] The Appellate Body then further stated:

> Article 3.3 recognizes the autonomous right of a Member to establish such higher level of protection, provided that that Member complies with certain requirements in promulgating SPS measures to achieve that level. ... It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*.[51]

47. In *Japan–Varietals,* the Appellate Body emphasized that under Article 5.6 of the SPS Agreement, the burden of proof was specifically on the complaining party, and that the panel could not "make the case" for the complaining party. In that case, the United States had identified two alternative, less trade restrictive measures, which were in its view reasonably available to Japan to achieve its chosen level of protection. The Panel, however, concluded that there was another less restrictive alternative, identified by the experts to the panel during the panel process. The Appellate Body reversed the Panel's ruling and concluded that since the burden was on the United States to demonstrate a violation of Article 5.6, it was for the United States to make a *prima facie* case that there are other alternative measures available, and that the panel should not "make the case" for the complainant.[52] The Appellate Body stated:

> Pursuant to the rules on burden of proof set out above, we consider that it was for the United States to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6. Since the United States did not even claim before the Panel that the "determination of sorption levels" is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the "determination of sorption levels" is an alternative measure within the meaning of Article 5.6.[53]

48. Under the SPS Agreement, Article 3.2 specifically provides that conformity of a Member's measures to relevant international standards means that they are "deemed necessary" and "presumed to be consistent" with the SPS Agreement and the GATT 1994. However, the Appellate Body states that Article 3.2 does not thereby impose any "special or generalized burden of proof" on the Member taking the measure:

> The presumption of consistency of the measure with relevant provisions of the SPS Agreement that arises under Article 3.2 in respect to measures that conform to international standards may well be an incentive for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorise imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a penalty.[54]

49. The TBT Agreement, in Article 2.4, commits Members in principle to using relevant international standards as a basis for their technical regulations. The use of international standards

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[50] *EC – Hormones*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, paragraph 102.

[51] *EC – Hormones*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, paragraph 104.

[52] *Japan – Measures Affecting Agricultural Products* (hereinafter *Japan – Varietals)*, Appellate Body Report, WT/DS/76/AB/R, paragraph 129. In paragraph 122, the Appellate Body confirmed its previous finding in the *EC-Hormones* case (paragraph 98) on the burden of proof under the SPS Agreement.

[53] *Japan – Varietals*, Appellate Body Report, WT/DS/76/AB/R, paragraph 126.

[54] *EC – Hormones*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, paragraph 102.

creates a rebuttal presumption that regulations that are taken in pursuit of a legitimate objective do not create "an unnecessary obstacle to international trade" (Article 2.5). In *EC – Sardines*, the Appellate Body referred to its discussions in *EC – Hormones* and reiterated that (as Members maintain the sovereign right to regulate) the burden of proof is always on the Member(s) challenging the WTO consistency of another Member's regulatory exercise:

> The *TBT* Agreement acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives.[55]
>
> There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.[56]
>
> Accordingly, we find that Peru bears the burden of demonstrating that Codex Stan 94 is an effective and appropriate means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.[57]

III. CONCLUDING OBSERVATIONS

50. As a basic feature, it is important to reiterate that the necessity tests contained in different WTO agreements cannot be used interchangeably. Rather, the tests have to be read in the context, and in the light of the object and purpose, of the agreement concerned.

51. To establish, to the extent possible, an objective benchmark for the necessity of a regulatory intervention, some WTO agreements refer to existing international standards. However, there are significant differences in the role and status of these standards. As noted above, under the SPS Agreement, a measure that conforms to international standards is deemed necessary and presumed to be consistent with relevant WTO obligations. The TBT Agreement creates a rebuttable presumption that measures in conformity with international standards do not create an unnecessary obstacle to international trade. In contrast, Article VI:5(b) of the GATS provides that in determining a Member's conformity with the standard-related requirements laid down in Articles VI:4 and VI:5(a), "account shall be taken" of the standards of relevant international organizations that are applied by that Member.

52. At a more general level, there are certain common themes that underlie the role of necessity tests in individual WTO agreements. Of particular relevance is the distinction between the tests used in the context of an active obligation and those that are applied in exception cases. The former tests are often associated with open, illustrative lists of policy objectives, and it would be for a complaining party to demonstrate in the first instance that another Member's measure is more trade restrictive than necessary to pursue the objective(s) involved. This differs significantly from the necessity tests governing the invocation of exception provisions. In this case, the agreements provide a listing of pre-defined objectives that tend to be more fundamental in nature, and the onus is put on the Member taking the measure to prove its necessity in light of the objectives.

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[55] *EC – Sardines*, Appellate Body Report, WT/DS/231, paragraph 276.
[56] *EC – Sardines*, Appellate Body Report, WT/DS/231, paragraph 281.
[57] *EC – Sardines*, Appellate Body Report, WT/DS/231, paragraph 282.

Annex

Relevant WTO Provisions

GATT

Article XX (General Exceptions)

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, *nothing in this agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures:*

(a) *necessary to* protect public morals;
(b) *necessary to* protect human, animal or plant life or health;
…
(d) *necessary to* secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (…)" (emphasis added)

Article XI (General Elimination of Qualitative Restrictions)

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:
...
(c) Import restrictions on any agricultural or fisheries product, imported in any form, *necessary* to the enforcement of governmental measures…. (emphasis added)

GATS

Article XIV (General Exceptions)

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, *nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:*

(a) *necessary to* protect public morals or to maintain public order;

(b) *necessary to* protect human, animal or plant life or health;

(c) *necessary to* secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …" (emphasis added)

Article XII (Restrictions to Safeguard the Balance of Payments)

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions

related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia,* the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

...

(d) *shall not exceed those necessary* to deal with the circumstances described in paragraph 1; (emphasis added)

<u>GATS Annex on Telecommunications</u>

<u>Paragraph 5(e)</u>

Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services *other than as necessary:*

(1) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;

(2) to protect the technical integrity of public telecommunications transport networks or services; or

(3) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule. (emphasis added)

<u>TBT Agreement</u>

<u>Article 2.2</u>

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, *technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create*. (emphasis added) Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

<u>Article 2.3</u>

Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be *addressed in a less trade-restrictive manner.* (emphasis added)

Article 2.5

> A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a *technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.* (emphasis added)

SPS Agreement

Article 2.2

> Members shall ensure that any sanitary or phytosanitary measure is *applied only to the extent necessary to protect human, animal or plant life or health,* is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5. (emphasis added)

Article 5.6

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are *not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection,* taking into account technical and economic feasibility. (emphasis added)

The footnote to SPS Article 5.6 further provides that:

> For purposes of paragraph 6 of Article 5, a measure is *not more trade-restrictive than required* unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is *significantly less restrictive to trade.* (emphasis added)

TRIPS

Article 3 (National Treatment)

> …
>
> 2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are *necessary* to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade. (emphasis added)
>
> …

Article 8 (Principles)

1. Members may, in formulating or amending their laws and regulations, adopt measures *necessary* to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. (emphasis added)

…

Article 27 (Patentable Subject Matter)

…

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is *necessary* to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law. (emphasis added)

…

Agreement on Government Procurement

Article XXIII (Exceptions to the Agreement)

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, *nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary* to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour. (emphasis added)