COMMENT

Non-Trade Concerns in Interpreting General Exception Clauses of WTO Agreements

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Abbreviations

AB	Appellate Body
DSB	Dispute Settlement Body
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade in Services
LTRA	Least trade alternative
WTO	World Trade Organization

Introduction

According to the preamble of the WTO[1] Agreement, its principal objective is the promotion of a liberalized non-discriminatory multilateral trading regime that enables member countries to spur their economic growth, enhance their standard of living and reach full employment level.[2] Many have criticized that this institution gives little concern for other social policies such as the environment. This has been reflected by the protests and demonstrations of anti-globalization and by environmental activists such as the 1999 WTO meeting in Seattle.[3]

It is true that, there is a high possibility for a trading regime that promotes only pro-trade interests to jeopardize regulatory autonomy of states in sensitive fields like social polices and environmental protection.[4] Pursuits towards the aversion of such dangers seem to require the incorporation of the General exception clauses in the trade agreements to exceptionally allow members to pursue other non-economic values that may be in contradiction with the international trade obligations under the WTO legal regime. However, the mere existence of the provision without proper interpretation does not guarantee the

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[1] See the paragraph before the comment for abbreviations.

[2] *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*Marrakesh Agreement* '), p 9.

[3] M. Weinstein (2001), "The Greening of the WTO", *Foreign Affairs*. 80(6), 147.

[4] S. Thomas (2004), The "necessity of trade-restrictive measures aimed at protecting the environment" Masters Thesis, R.U.G, p.3.

recognition of non-trade policy concerns. For the surprise of many, in recent cases decided by WTO, the DSB seems to have given fair interpretation for the general exception clauses of GATT and GATS.

From the reading of the General exception clauses we can infer that the WTO legal framework allows member states to entertain only specific policy exceptions and these exhaustive exceptions are listed in sub-paragraphs (a) to (j) of Article XX of GATT and Article XIV of GATS. Article XX permits measures that are:

a) Necessary to protect public morals;
b) Necessary to protect human, animal or plant life or health;
c) Relating to the importation or exportation of gold or silver;
d) Necessary to secure compliance with laws or regulations which are not inconsistent with the GATT;
e) relating to the products of prison labour;
f) imposed for the protection of national treasures of artistic, historic or archaeological value;
g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to certain criteria;
i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during certain periods; and
j) essential to the acquisition or distribution of products in general or local short supply.

The General Exception clauses verify that free trade cannot always be above other policy concerns.[5]

This comment focuses on analyzing and evaluating whether the interpretation of the General Exception clauses by the DSB have allowed governments to promote legitimate policy concerns. Emphasis is given to the analysis of the interpretations given on Article XIV (a) of GATS, Article XX (b),(d) and (g) of GATT due to the availability of trade disputes on these areas.

[5] *Ibid.*

1. General Sequence of Interpretation of Article XX and XIV of GATT and GATS

Before dealing with the general sequence of interpretation of the exception clauses, it is necessary to have a brief look into who bears the burden of proof if a member State attempts to justify its measure which is inconsistent with its WTO obligation. The burden of proof is borne by the party who invokes the specific sub-paragraphs of the exception clauses. Such party must demonstrate that the measure is compatible with all the criteria set in the general exception clause.[6]

According to the existing dispute settlement practice, any measure which needs justification under the General exception clauses of the goods and services agreements must pass the so-called 'two-tier' test[7] to enable a responding state to successfully justify its measure under the exception clauses. Primarily, the objective of the measure must fall within the scope of any of the listed exceptions.[8] In the second step of tier one the measure must meet the criteria set by the sub clause set in question.[9] In tier two the measure taken must pass the requirements of the introductory clause or 'chapeau'.[10]

The failure of panels to properly implement the sequence of steps in interpreting Article XX of GATT and XIV of GATS can lead to an erroneous conclusion as demonstrated in the *Shrimp/Turtle*[11] case. Here the panel reversed

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[6] L. Simon, and B. Mercurio (2008), *World Trade Law Text, Materials and Commentary* (Oxford and Portland, Oregon: Hart publishing) p. 382.

[7] Nicolas F. Diebold (2007), "The Morals and Order Exceptions in WTO law: Balancing the Toothless Tiger and the Undermining Mole", *Journal of International Economic Law*. 11(1), p, 44.

[8] N. Gehi Working Paper No. *Evaluating the WTO'S Two Step Test for Environmental Measure under Article* XX. Available from World Wide Web: <http://.Law.gmu.edu/pubs/papers/06-4806-48:> p.19.

[9] J. Harrison (2007), *The Human Rights Impact of the World Trade Organization* (Portland: Hart Publishing), p. 216.

[10] *Ibid.*

"***Chapeau***" refers to the introductory clause or heading of the exception clauses in WTO and lays down the requirement that measures taken by WTO members as exceptions to their WTO obligations must not be applied in such a way that they would be arbitrarily or unjustifiably discriminatory between countries where similar condition prevails or be a disguised restriction on international trade in goods and services.

[11] US-Shrimp, at issue were US regulations under the endangered species Act that imposed an import ban on imports of shrimp from countries that did not meet unilaterally imposed US Standards for the protection of migratory sea turtles. J Condon, B. (2005). Working paper series. *The existence of the duty to negotiate in the*

the usual way of interpretation and investigated the fulfilment of the chapeau first and rejected the shrimp ban of US.[12] On Appeal, the Appellate Body stated that the panel's decision to invert the analysis of Article XX led it to err in its examination of the chapeau. It was expected to examine the application of the measure rather than the design and purpose of the measure which led to the decision that the measure is in conflict with the entire WTO system.[13]

Failure to examine the validity of a measure first by investigating it in light of the detailed sub-paragraphs of the exception clauses can adversely interfere in the achievement of the desired objectives of the exception clauses. Checking the fair applicability of a measure without first checking the validity of the measure itself is not a logical procedure. If we follow the sequence of interpretation adopted by the *Shrimp/Turtle* panel, it might hinder members from effectively utilizing their rights under the exception clauses since it can inhibit adjudicating bodies from properly interpreting the introductory clause.

2. Interpretation of the scopes of the sub-clauses in the General exception clauses of the WTO

The question that arises at this point is whether the interpretation of DSB concerning the scope of the specific sub-clauses of the General exception clauses has allowed members to uphold their genuine policy interests. One may argue that that WTO adjudicatory bodies have (in different cases) generously broadened the scope of the sub paragraphs in the General exception clauses so as to allow members to pursue different national policy goals.

This argument can be substantiated by examining the interpretation given in the *US-Gambling* case concerning the scope of Art XIV (a) of GATS. This particular sub-clause allows members to take trade-restriction measures so as to protect public morals and this clause has been applied in the *US-Gambling* case.

Here the US imposed a ban on internet gambling justifying its measure by raising the public moral exception and the panel was burdened with a huge task of defining the terms 'public moral and order'.[14] Through its interpretation the panel gave a wider discretion for member states to define and apply their own

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genera exception of GATT and GATS. Available from World Wide Web: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=704749> p 11.

[12] K. Trish (2007), *The Impact of the WTO: the Environment, Public health and Sovereignty* (Edward Elgar Pub.) p 43

[13] *Ibid*, p 44.

[14] Harrison, *supra note* 9, p. 208.

concepts of public morals and public order according to their system and scale of value.[15]

This is an acceptable interpretation seen in light of Art 31 of the 1969 Vienna Convention on the Law of Treaties which permits the interpretation of treaty terms according to the object and purpose of a treaty.[16] The purpose of Article XIV of GATS is to tolerate members when they violate their obligations to pursue their national policy objectives which are within the scope of the provision. Due to the evolutionary nature and subjectivity of public morals and orders, setting a fixed morality standard could have highly restricted members from justifying their measures according to their domestic moral and public order and this would be contrary to the object and purpose of Articles XIV (a) and XX (a) of GATT.[17]

The Appellate Body (hereinafter referred to as AB) *has* in the *Hormone case* clarified that if the meaning of a treaty is ambiguous, the meaning to be preferred is the one "which is less onerous to the party assuming an obligation or which interferes less with the territorial and personal supremacy of a party, or involves less obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties". This guideline of interpretation seems to have widened the opportunity of states to utilize the General exception clauses.[18]

The panel's interpretation of the scope of the term 'public moral and order' is broad enough to allow a member to raise the public moral defence as long as it has concrete evidence for the existence of the public morals that it claims to exist in its territory. Such interpretation has allowed the measures taken by the US to be under the public moral exception of GATS. Moreover, since the panel adopted the evolutionary interpretation of treaty terms there is a possibility of justifying trade related human rights measures under Article XX (a) and XIV (a) of GATT and GATS respectively.[19]

The issue of whose morals are protected under Article XIV (a), does not seem to be a subject of ambiguity. Looking at the preamble of GATS, the territorial effect of the measure is limited.[20] Members are allowed to regulate or

[15] Diebold, *supra note* 7, p. 55.
[16] Harrison, *supra note* 9, p. 54.
[17] *Ibid.*
[18] C. Steve (1998), "The Moral Exception in Trade Policy", *Virginia Journal of International Law Association*, 38(689), p. 6.
[19] Harrison, *supra note* 9, p. 211.
[20] Gehi, *supra note* 8, p. 70.

introduce regulation of supply of services within their territory to protect national policy objectives.[21]

Moreover, the DSB'S interpretation of the scope of Article XX (g) of the GATT in *Shrimp/Turtle* that, allows wide interpretation that has positive implication concerning the weight given to environment.[22] This sub-clause allows members to take trade restrictive measures to conserve 'exhaustible natural resources'.

In the *Shrimp/Turtle case* the measure was taken to conserve sea turtles and the US here argued that sea turtles are 'exhaustible natural resources'. The AB in the *Shrimp case* took in to consideration the progress of environmental laws and concerns; as a result it adopted the 'evolutionary approach' of treaty interpretation in classifying renewable living things like Turtles as exhaustible natural resources.[23] It asserted that though living organisms are capable of reproduction, just like minerals and non-living resources they are capable of depletion and extinction and rejected the argument of the complainants.[24] Moreover, they stated that the preamble of the WTO agreement recognizes the need of sustainable development and it reflects the importance of keeping and conserving the environment. Hence, the AB decided to broaden the interpretation of the term 'exhaustible natural resources'.

This evolutionary way of interpreting treaty terms is strong evidence that confirms that other non-trade policy concerns like the environment are given due weight in the WTO trading system. Had the AB interpreted the term 'exhaustible' natural resources from a static perspective taking into account the intended meaning of the word in the GATT agreement which was constructed 50 years ago, it would have barred members from properly promoting their current existing genuine policy interests because it is argued that in the GATT agreement 'exhaustible' natural resources was intended to refer to non-living resources like minerals.[25] The other major theme we can observe from the interpretation of the AB in the *Shrimp/Turtle* case is that member States in some circumstances can take measures that do have extra-territorial effect.

In the *US-Tuna* case, the panel addressed the issue of whether extraterritorial measures aimed at protecting the environment were legally justifiable under the GATT and particularly under Article XX (g) and (b).[26]

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[21] *Ibid.*
[22] Simon & Mercurio, *supra* note 6, p. 404.
[23] Trish, *supra note* 12, p.207.
[24] *Ibid*, p. 45.
[25] *Ibid.*
[26] Sebastian, *supra note* 4, p. 17.

Investigating the intention of the drafters, the panel decided that Article XX does not authorize such interpretation.[27] However, looking at the shrimp/turtle case the DSBs have to some extent allowed the justification of measures that have extraterritorial effect if at least the extra-territorial objective of the policy has impact on the domestic territory.[28] This seems to indicate a significant step in the recognition of other policy concerns like the environment in the international trading regime.

From the analysis of the interpretation given in the above cases, the DSB of the WTO seems to widely interpret the scope of the sub-clauses of Article XX and XIV of GATT and GATS respectively and this has a positive implication concerning the weight given to other non-trade concerns and has allowed genuine national policy concerns to pass the first step of tier one test. Yet, there is the need to briefly analyze how the DSB interprets the other sequence of tests before deciding disputes addressing the General exception clauses.

3. Analysis of the DSBs interpretation of the criteria set in the Sub-clauses of the General exceptions

Where the measure of a member State that is challenged by a complaint is found to fall within the scope of the public policies of Article XX (a), (b), and (d), the next issue becomes whether the measure is 'necessary'. Where the challenged measure is within the scope of Article XX (g), the measure has to be 'related to' the conservation of natural resources[29]and it is argued that the interpretation of this test raises a fundamental pro-trade bias which mitigates legitimate decision-making.[30] One may observe that until the decisions rendered in the *Korea-Beef* case, *Asbestos* case and *US-Gambling case* this requirement was narrowly interpreted by adjudicatory bodies in a manner that mitigated legitimate policy concerns.

In the 'Thailand-Cigarette' case, where the 'necessary' requirement was scrutinized for the first time under Article XX (b) of GATT, Thailand justified its import restrictions on cigarettes on the ground that it aimed to protect the public from harmful ingredients in imported cigarettes.[31] Here, the panel concluded that "the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX (b) only if there were no alternative measures consistent with the General agreement, or less inconsistent with it,

[27] *Ibid.*
[28] Gehi, *supra note* 8, p. 68.
[29] Trish, *supra note* 12, p.5.
[30] *Ibid.*
[31] *Ibid.*

which Thailand could reasonably be, expected to employ to achieve its health policy objectives."[32] In other words, the measure is expected to be indispensable to meet the necessity criteria. The panel decided that the measure was not 'necessary' since it wrongly applied the facts of the case to the least-trade alternative (LTRA) criteria of necessity. It was required to take into account the level of protection chosen by the government and the effectiveness of the alternative measures when it analyzed the 'necessity' of the measure based on the existence of alternative measures. .[33] One may doubt whether the decision of this case would be similar if it was entertained in line of the current WTO DSBs interpretation of the necessity test.

If there is reasonably available LTRA that is equally effective and that has the capacity to achieve the desired policy goal, one can see no reason for permitting member States to take more trade restrictive measures. However, environmentalists argue that rigid application of the LTRA test will highly inhibit members from passing this test since there will often be some alternative measure that could have been taken, and specially justifying measures like imposition of total ban will be very difficult.[34]

Looking at the interpretation of the necessity test in the *Korea-Beef* case, *Asbestos* case and *US-Gambling* case, we can perceive that the DSBs of the WTO have introduced a flexible way of interpretation that reflects the concern given to other policy spaces. In the *Korea-Beef case*[35] where the necessity test is entertained under Article XX (d), the AB stated that the interpretation of 'necessary' is located closer to the pole of indispensable than to the opposite pole of simply making contribution to.[36] This interpretation is reiterated in the *Asbestos case* and it was developed further in the *US-Gambling* case. The AB in the above cases stated that "the definition of necessary 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 and the importance of the protected value." [37] In the *US-Gambling* case it was decided that an alternative measure is not a reasonable one if it brings an undue burden on the responding member or if it fails to allow the

[32] Trish, *supra note* 12, p.14.
[33] *Ibid.*
[34] Nicholas, *supra note* 7, p.384.
[35] The dispute involved a difference in treatment of domestic and imported beef, which Korea alleged was 'necessary' to protect consumers against fraudulent practices condemned by Korea's Unfair Competition Act. BernascolI, N. (2005). *Environment and Trade: A Guide to WTO Jurisprudence*. Earthscan Publications Ltd. P.149.
[36] Trish, *supra note* 12, p. 32.
[37] Trish, *supra note* 12, p. 7.

responding country its desired level of protection concerning the interest pursued.[38]

Based on such interpretation it acknowledged France's ban of Asbestos and its products asserting that Canada's restricted use alternative cannot be a reasonable one since it fails to achieve same end with the contested measure[39] and Korea's measure was not justified since it failed to demonstrate that alternative measure was an unreasonable one.[40]

In light of the foregoing, the latest interpretation of the 'necessity' test seems to be flexible and has allowed measures that promote genuine policy concerns to be justified and, in effect, pass this level of test. A good example is the *Asbestos case*.

4. Interpretation of the chapeau

The purpose of the chapeau is protection of abuse of the General exception clauses. Though member states are allowed to pursue non-trade policy goals listed in the exception clauses, there is a significant risk for abuse if they are left uncontrolled. With the view of safeguarding the integrity of the multilateral trading regime, the introductory clause ensures the fair and proper applicability of the measure at issue. The chapeau does not address the substantive element of the measure but rather deals with the application or implementation of it. To pass this last test the application of the measure should not cause an arbitrary discrimination, unjustifiable discrimination or disguised restriction of trade where similar conditions prevail.[41]

Some scholars contend that though the AB's interpretation of the chapeau in the *Shrimp/Turtle* case has validated and recognized the role of unilateral environmental measures, the condition attached to it somehow creates impediment for state parties to exercise their right. They support their argument by stating that, careful reading of the General exception clause reveals that there is lack of clarity concerning the measure that needs justification, and whether it refers to a unilateral, multilateral or regional measure.[42] However, from the

[38] *Ibid.*
[39] *Ibid.*
[40] Bernascol, *supra note* 35. p,150.
[41] General Agreement on Tariffs and Trade 1994, Apr. 15, (1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 17 (1999), 1867 U.N.T.S 187,33I.L.M, 187, 33 i.L.M. 1153, Article XX .
[42] E.gaines, S. (2002). Working paper series. *The WTO'S Reading of the GATT Article XX Chapeau: a disguised Restriction on Environmental Measures*. Available from

ruling of the *Shrimp/Turtle* case the WTO seems to order countries taking unilateral environmental measure to make multilateral negotiation before qualifying their action under the chapeau so as not to make unjustifiable discrimination. [43]

They argue that it is not feasible to negotiate with all interested members, the extent of negotiation is not clear and such request of negotiation establishes an unpredictable threshold for access to Art XX.[44] This was demonstrated with the AB's rejection of the original US measure in the Shrimp/Turtle case.

On the other side of the argument other scholars disagree and argue that the way the AB interpreted the chapeau in the Shrimp/Turtle case is a balanced one which took into account both the substantive trade rights guaranteed in the WTO and also the interests of the environmental community.[45] The AB appropriately created a balance between the right of a member to invoke the general exception clause and pursue its policy interests and the obligation of this party to respect its stated trade obligations in WTO agreements.[46]

I think examining the facts of the case and the reasoning of the AB allows us to support those scholars who argue that the AB has made somehow a balanced interpretation.

> As the facts of the case indicate, "the United States issued regulations that required shrimp exporting countries to use turtle excluder devices 'TED'. TED is a grid trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtle and other unintentionally caught large objects out of the net. The congress passed a law that imposed an import ban on shrimp from particular countries unless the foreign government at issue has a programme in place to protect sea turtles during shrimp trawling in a manner similar to the programme applied to US shrimpers."[47]

After critically looking the facts of the case, the AB reversed the interpretation of the panel and found out that the US measure falls within Article XX (g) but struck down the measure since it fails to meet the chapeau criteria. The AB stated that the US measure required complainant governments to adopt exactly

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World Wide Web:< http://papers.ssrm.com/so13/papers.cfm?abstract_id=301404> p. 803.

[43] Chimini, B.S. (2002). WTO and Environment: Legitimisation of Unilateral Trade Sanctions. *Economic and Political Weekly*. 37(2), p.135.

[44] *Ibid.*

[45] E. Appleton. 1999 Shrimp/Turtle: Untangling the Nets. *Journal of International Economic Law*. 2(3) p 478.

[46] *Ibid.*

[47] Simon & Mercurio, *supra note* 6, p. 403.

similar policy with that of the US without taking in to account different conditions of the countries.[48] I think the way the AB interpreted discrimination is proper because from the *à contrario* reading of the chapeau it is possible to understand that discrimination occurs not only when we treat countries with similar conditions differently but also when we treat countries with different conditions similarly.[49] As long as the objective of the measure can be met through equivalent but different measure, there seems to be no reason why states are allowed to require others to adopt similar policies. Otherwise some countries can use this gap to create disguised restriction on international trade, and developed countries can request LDCs and developing countries to adopt costly unilateral environmental measures which are hardly affordable. Thus, a rigid measure that applies to all without taking the circumstances of each member into account should not pass the chapeau test since it amounts to disguised trade restriction.[50]

The second measure which forced the AB to declare that the US measure as 'unjustifiable discrimination' is the fact that US conducted negotiation with some countries like the Caribbean and even gave them more time to implement the measure whereas it did not attempt to do the same thing with other countries like the complainants. Moreover, they were given shorter time for implementation.[51] This is clearly an 'unjustifiable discrimination'. The US measure also prohibited imports of shrimp caught using TED if they are from a non-certified countries.[52] However, if the sole purpose of the US measure was to effectively protect sea turtles from danger then as long as exporting countries are using TED, the mere fact that they are uncertified should not impede them from exporting shrimp to the US. Hence, this requirement was completely unnecessary and the AB's determination of this criterion as 'unjustifiable discrimination' is proper.

In sum, the AB's interpretation of the chapeau in the Shrimp/Turtle case is a good one that attempted to balance environmental and trade issues. I want to reiterate that the task of creating this balance is not an easy one and in the Shrimp case US desire to protect sea turtles was recognized by WTO in a manner that took in to consideration the substantive rights of the complainants in the WTO agreements.

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[48] *Ibid.*
[49] Chimini, s*upra note* 43, p. 781.
[50] Chimini, s*upra note* 43, p. 781.
[51] Simon, *supra note* 6. p. 410.
[52] *Ibid.*

Conclusion

In light of the brief discussion here-above, the interpretation made by the DSB of the WTO with regard to the General exception clause indicates that it has started to take other policy concerns into account and is attempting to create a balance between international trade and other social policies.

The interpretations given for the terms 'public moral and order' and 'exhaustible' natural resources in the *US-Gambling* case and *Shrimp/Turtle* case have respectively widened the scope of public policies that can be justified under the General exception clauses. Due to this interpretation, the US's public moral policy and Turtle protection has been found within the domain of Article XIV (a) of GATS and Article XX (g) of GATT. In the *Shrimp/Turtle* case the interpretation of the AB has recognized to some extent measures with extra-territorial effect although the GATT panels underlined that such measures are not recognized within the WTO.

The new necessity test introduced in the *Korea/Beef* case has given some flexibility to this so as to allow the entertainment of other policy concerns in the WTO trading regime. This interpretation seems to have balanced trade and other equivalent social policies. Because of such interpretation the WTO in the *Asbestos* case for the first time justified trade restrictive measure taken to promote health policy. Moreover, the AB also recognized members' autonomy of determining their own level of protection in areas of health. Hence, it permitted France to continue with the import ban.

In order to further allow states promote their policy interests within the General exception clause the WTO DSBs, there is the need for a careful interpretation of the chapeau. If the AB is going to make bilateral or multilateral negotiation a mandatory requirement to qualify a measure to pass the test of the chapeau, then it can create impediments for members who seek to take genuine unilateral environmental measures. And on the other hand, it is not possible to totally exclude negotiation from serving as a requirement to fulfil the criteria of the chapeau. It is also difficult to conclude that the AB is making some kind of negotiation mandatory by merely looking at the decision of the *Shrimp/Turtle* case.

The negotiation element should thus be determined case by case taking into account different factors and circumstances. Finally, there seems to be the need to reiterate that the current interpretation of the General exception clause is an encouraging progress and it has indeed, to some extent, allowed members to have some policy space as can be observed from the *Shrimp/Turtle* case and *Asbestos* case. ■