

WTO'S INTERPRETATION OF GATT ARTICLE XX CHAPEAU: A DISGUISED RESTRICTION ON ENVIRONMENTAL MEASURES

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Abstract — Given the significant growth of international trade in our contemporary society, the World Trade Organisation (WTO) is experiencing numerous challenges in balancing economic growth with sustainable development. Consequently, the global multilateral trading system has attempted to resolve this conflict by creating various express exceptions to free trade through the incorporation of GATT Article XX. By allowing WTO members to suspend their trade liberalisation obligations for specific purposes, this escape clause has provided nations with a hidden avenue to implement trade-restrictive measures. For the purposes of this paper, the effectiveness of the exceptions under GATT Article XX will be discussed by analysing its impact on multilateral trade liberalisation.

Keywords: GATT, WTO, Trade Liberalisation, Multilateral Trade, Most- Favoured Nation

I. IMPACTS OF GATT ARTICLE XX

The aim of international trading regimes of both GATT and the WTO has been to achieve trade liberalisation through its core principles which

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are in relation to non-discrimination and prohibition of quantitative restrictions.¹ The non-discrimination principle is reflected through the concepts of ‘Most-Favoured Nation’ (MFN) and ‘National Treatment’ (NT), which are enshrined in Article I and Article III of GATT respectively.² The MFN rule requires each member nation to not grant any special trading advantages to another trading partner.³ Furthermore, the NT obligation imposes a rule against discrimination between goods that are domestically produced and those that are imported.⁴ The elimination of quantitative restrictions through Article XI complements the non-discrimination principle as it reduces trade barriers for the purpose of achieving economic development through free trade.⁵ These principles allow members to efficiently allocate the use of their resources by exploiting their comparative advantage, which gives countries the opportunity to specialise in producing certain goods and services.⁶

The General Agreement on Tariffs and Trade (GATT) signed on 30th October 1947 is an international treaty signed by 23 nations initially, and later developed into WTO (World Trade Organization) which aims to expand and grow world trade through reduction of trade barriers. While drafting GATT, the drafters realized that sometimes certain situations/circumstances may require barriers and thus, they included Article XX in GATT. GATT Article XX provides circumstances, which allow any country to suspend ordinary provisions of GATT. This provision is preceded by a paragraph that explains the criteria when such deviation can be made from the ordinary provisions of GATT. This is called as “Chapeau” of Article XX. The chapeau has been the contention of debate since it determines when the defenses can be invoked.

However, the incorporation of the general exceptions through Article XX directly in a way affects these general principles as it allows developed countries to impose trade-restrictive measures at the detriment of developing countries which are restricted in utilising their comparative advantage.⁷ Given that developing countries normally do not have ample variety of resources, they are forced to rely on their labour and over-exploit their limited resources.⁸ This shows that even though Article XX is a means of achieving sustainable development, it will have a detrimental impact on developing countries.

¹ Mike Meier, “GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing so Adversely Affects Trade?” (1997) 8 *Colorado Journal of International Environmental Law and Policy* 241, 242.

² *Ibid.*

³ Thomas J. Schoenbaum, “Free International Trade and Protection of the Environment: Irreconcilable Conflict?” (1992) 86 *The American Journal of International Law* 700, 706.

⁴ *Id.*, 707.

⁵ *Id.*, 708.

⁶ Tania Voon, “Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol” (2000) 10 *Journal of Transnational Law and Policy* 71, 74.

⁷ Schoenbaum, above n 3, 703.

⁸ *Id.*, 703-4.

Furthermore, the exhaustive list of exceptions under this Article also has a detrimental impact on trade liberalisation because it gives countries the opportunity to implement trade-restrictive measures for a protectionist end rather than for a sanitary, phyto-sanitary, environmental or conservation purpose. This has been highlighted through the *'Thailand – Cigarettes'* dispute where Thailand imposed restrictions on importation of and internal taxes on cigarettes. United States argued that Thailand had misused the purpose of Article XX because they had not imposed 'any safeguards comparable to an import prohibition with respect to domestic cigarettes'.⁹ Furthermore, Thailand argued that they introduced this measure to 'protect human life and health' under Article XX (b), yet the domestic production and sales were at high levels.¹⁰ This clearly demonstrated that Thailand introduced this measure to protect their domestic tobacco industry rather than for the health hazards of smoking.¹¹

Consequently, it is evident that the application of these exceptions infringes the core principle of non-discrimination. However, these impacts are minimised through the inclusion of the introductory clause (chapeau) of Article XX and the ancillary WTO agreements, which attempt to achieve a balance between sustainable development and trade liberalisation.

II. CHAPEAU OF ARTICLE XX

In accordance with the judgement in the *'Reformulated Gasoline'* case, a measure needs to satisfy the two-tier test of Article XX, which includes the measure at issue coming under one of the exceptions and also meeting the requirements of the opening clause of Article XX.¹² The 'chapeau' to this Article only accepts measures that are not applied in a manner which may be regarded as being 'arbitrary or unjustifiable discrimination' and a 'disguised restriction on international trade'.¹³ The importance of the first condition, arbitrary or unjustifiable discrimination, was emphasised by the *Tuna I* case involving the United States restrictions on imports of tuna.¹⁴ They stated that even though the application of Article XX would amount to discrimination, it cannot be arbitrary or unjustifiable.¹⁵ Moreover, the second criterion was incorporated to prevent contracting parties from attempting to cover up their protectionist practices by invoking Article XX.¹⁶

⁹ PadidehAla'i, "Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization" (1999) 14 *American University International Law Review* 1129, 1141.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Meier, above n 1, 256.

¹³ Voon, above n 6, 79.

¹⁴ Betsy Baker, "Protection, Not Protectionism: Multilateral Environmental Agreements and the GATT" (1993) 26 *Vanderbilt Journal of Transnational Law* 437, 450.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

For example in the ‘Shrimp-Turtle’ case, the United States prohibited the importation of certain shrimps and shrimp-related products because they may adversely affect certain sea-turtles.¹⁷ The WTO panel stated that the imposition of this trade-restrictive measure would be unjustifiably discriminatory as it required other members to adopt a same regulatory program.¹⁸ This suggested that this policy was ‘more concerned with effectively influencing WTO members to adopt the same comprehensive regime’ rather than protect and conserve sea turtles.¹⁹ Consequently, the chapeau of Article XX strengthened the application of the exceptions as members could not misuse these general exceptions for protectionist purposes, which would generally have a detrimental impact on multilateral trade liberalisation.

The WTO panel decision, “United States –Measures Affecting the Cross-Border Supply of Gambling and Betting Services”²⁰, is an important decision not only for USA but for all WTO members. The WTO panel in November 2004 gave its verdict in favor of Antigua’s claim that the US regulations which prohibit internet gambling are not consistent with its obligations under GATS. The United States had lost both the Article XIV defense and the case to Antigua’s claim that several U.S. laws on banning internet gambling violated GATS commitments by hampering the cross-border supply of gambling services. The United States invoked Article XIV (a) and (c) stating that maintaining society free of organized crime is both an issue of “public morals” and “public order”. US further stated that the gambling laws “are necessary to secure compliance with all the various WTO-consistent US criminal laws violated by organized crime activities.” WTO panel found that the United States failed the “necessity” threshold by not fully exploring and exhausting WTO-consistent alternatives to its gambling laws. The panel also assessed the compliance with the chapeau and found that U.S. defense had also failed the chapeau threshold. WTO Appellate Body upheld this decision.

In Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres²¹, Brazil used Article XX (b) of GATT as a defence in the WTO. As we know, Article XX (b) relates to measures, which are necessary to protect human, animal or plant life or health. The party invoking Article XX (b) has to prove two elements (along with compliance of the chapeau of Article XX): (i) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or health; and ii) inconsistent measures for which the exception was being invoked were necessary to fulfil the objectives.

¹⁷ Ala’i, above n 9, 1167.

¹⁸ *Id.*, 1166-67.

¹⁹ *Id.*, 1168.

²⁰ World Trade Organization, “United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,” Report of the Panel, WTO document symbol WT/D285/R, 10 November 2004.

²¹ WT/DS332/AB/R, 3 December 2007.

The Appellate Body held for the first time that the objective of the measure at issue should be considered in the chapeau analysis. It found that Brazil's decision to abide by the MERCOSUR ad hoc Arbitral Tribunals award and its administrative authorities decision to comply with injunctive orders from its judiciary were contrary to the chapeau of Article XX because there was no relationship to the legitimate objective pursued by the import ban. Brazil's defence under Article XX failed because its enforcement of the import ban was not watertight and hence not compliant with the chapeau of Article XX. In this particular case, Brazil just wanted to protect the health of its citizens while the Appellate Body aimed to be the overall guardian of free trade. Therefore, despite knowing the terrible health conditions in Brazil, the Appellate Body refused the defence of Article XX on the basis that the MERCOSUR exemption and the court injunctions were not in consonance with the objective pursued by the import ban.

On May 22, 2014, the World Trade Organization's Appellate Body (AB) issued its report in the *EC – Seal Products* dispute.²² The decision arose from complaints by Canada and Norway against a legislative scheme adopted by the European Union (EU) in 2009 to prohibit the importation and marketing of seal products (EU Seal Regime). The Appellate Body concluded that the EU Seal Regime falls within paragraph (a) of GATT Article XX because it was necessary to protect public morals.

III. SPS & TBT AGREEMENTS

Furthermore, the TBT and SPS agreements have been created to act as ancillary agreements to the exceptions under GATT Article XX.²³ These complementary agreements have the purpose of ensuring that non-discrimination and national treatment provisions of GATT are not being violated through technical regulations.²⁴ In particular, the TBT agreement allows members to apply national standards which are subject to the condition that they do not create unnecessary obstacles to international trade.²⁵ Consequently, it is intended to prevent the technical standard being misused for protectionist ends.²⁶

The SPS agreement complements the TBT agreement by facilitating the protection of animal, plant and human health through the creation of technical rules. By providing an eleven part enquiry, it elaborates on the lack of specificity outlined in Article XX (b) and offers an exception for all qualified

²² Appellate Body Report, "*European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*", WT/DS400/AB/R and WT/DS401/AB/R (May 22, 2014).

²³ Meier, above n 1, 273.

²⁴ *Id.*, 277.

²⁵ Schoenbaum, above n 3, 716.

²⁶ *Id.*, 717.

sanitary and phyto-sanitary measures.²⁷ Moreover, as evident by the interpretive note, both these agreements can supersede the other GATT rules in cases of conflict.²⁸ This emphasises that by providing more clarity to the exception under Article XX (b), these agreements may reduce the negative impact of the exceptions on trade liberalisation as they consider the core principles of GATT. Hence, even though Article XX may significantly affect the trade liberalisation through the application of trade-restrictive measures, these agreements minimise the impacts by ensuring that members cannot misuse these exceptions for a protectionist end.²⁹

IV. JUSTIFICATION OF ARTICLE XX

Having established that these exceptions under Article XX have a negative impact on trade liberalisation, the necessity of this Article needs to be examined. By failing to consider any external factors, the operation of comparative advantage has the potential to promote environmentally destructive production and over-exploitation of all resources which can create market failure.³⁰ This would not only harm the environment but also raise human rights issues through the abuse of labour standards in developing nations.³¹ Consequently, the inclusion of Article XX into GATT has permitted the adoption of policies and interests which are outside the realm of trade liberalisation for the purpose of achieving sustainable development.³² Given the detrimental effects of trade liberalisation without any exceptions, the inclusion of general exceptions through Article XX is justified as a means of achieving ‘sustainable development’.

V. NEED FOR REFORMING ARTICLE XX

Given that these exceptions are justified and essential in balancing economic growth with social and environmental impacts, Article XX seems to effectively recognise the adverse effects of free trade. However, the problems arise through the use of broad terminology within Article XX.³³ This has led to numerous inconsistencies with various GATT and WTO panels providing differing interpretations.³⁴ As a result, the ambiguous terms within Article XX are construed on a case-by-case basis.³⁵ For example, the GATT Panel gave a narrow interpretation in the *Tuna I* case by stating that the United States’

²⁷ Meier, above n 1, 273.

²⁸ *Id.*, 275.

²⁹ Schoenbaum, above n 3, 717.

³⁰ Voon, above n 6, 74-5.

³¹ Tatjana Eres, “The Limits of GATT Article XX: A Back Door for Human Rights” (2003) 35 *Georgetown Journal of International Law* 597, 601.

³² Voon, above n 6, 80.

³³ Ala’i, above n 9, 1154.

³⁴ *Id.*, 1154.

³⁵ *Id.*, 1170.

Marine Mammal Protection Act' (MMPA) had not met the requirement of 'least-GATT inconsistent measure' and the US had also not exhausted all possible avenues before adopting the measure.³⁶ Moreover, the panel did not consider the goals of the Article XX exception within the multilateral trading system.³⁷ Consequently, the panel ruled that this measure failed to satisfy the requirements of both exceptions under Articles XX(b) and (g).

However, in contrast to the previous GATT decisions, the panel in *Tuna II* case took a more expansive view by taking the objectives of sustainable and the environment into consideration.³⁸ Similarly, the Appellate Body in the Gasoline appeal case highlighted the previous panel had not interpreted the GATT in accordance with Vienna Convention on the Law of Treaties (Vienna Convention), which requires that the terms be interpreted in good faith and in light of its purpose.³⁹ As a result of these foregoing interpretations, Article XX needs to be reformed to minimise ambiguity and uphold measures, which aim to achieve sustainable development.

The analysis under Art XX has been *two-tiered*, traditionally requiring that a measure satisfy one of the particular exceptions in sub-paragraphs (a) to (j) and the independent requirements imposed by the chapeau (as held in *US – Gasoline* case)⁴⁰. The order as given in *US – Shrimp*,⁴¹ requires first looking at the measure itself under the sub-paragraphs and then at the way in which exception is applied under the chapeau.

The measures in question here would fall under Art XX(b), which allows Members to take measures “necessary to protect human, animal or plant life or health” that otherwise violate their GATT obligations. It is clear, as a matter of fact, that the bans may be imposed to protect lives during covid pandemic. Since Covid-19 has been declared as a pandemic by WHO, the countries have primary interest in protecting the lives of their citizens. This implies that there are chances that various bans like export bans etc. will be imposed and justified in view of covid 19.

As is expected, that the members, in order to protect themselves from any emergency during covid, may hoard essential goods and services (through either export or import) at a level which may be unreasonably and obnoxiously

³⁶ Bruce Neuling, “The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate” (1999) 22 *Loyola of Los Angeles International and Comparative Law Review* 1, 21.

³⁷ *Id.*, 20-1.

³⁸ Ala'i, above n 9, 1153.

³⁹ Meier, above n 1, 268.

⁴⁰ WTO Appellate Body Report, “United States – Standards for Reformulated and Conventional Gasoline” (US – Gasoline), WT/DS2/AAB/R, adopted 29 April 1996.

⁴¹ WTO Appellate Body Report on “United States – Import Prohibition of Certain Shrimp and Shrimp Products”, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

higher than what may be even be required in worst possible scenario. For example, if a country develops drugs/vaccines for covid control with its technology, then there will be an overall increase in demand for the said drug/vaccine all across the world; however, the country may serve its citizens and their demands first before helping other nations. In such cases, any export restrictions (in the form of Quantitative restrictions) shall be justified under Art XX(b).

VI. CONCLUSION

Therefore, given the increasing recognition of environmental and social impacts of trade liberalisation, the inclusion of Article XX is a step in the right direction as it ensures that the overall objective of sustainable development is satisfied. Furthermore, the introductory clause and the subsequent WTO agreement greatly strengthen the effectiveness of Article XX. However, as evident by the varied interpretations of Article XX through numerous cases, reforms need to be brought in providing more coherent and definite terminology.