

EXCEPTIONS TO WORLD TRADE ORGANIZATION'S RULE OF LAW: AS CAPACITY BUILDING TOOLS TO DEVELOPING MEMBER COUNTRIES

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ABSTRACT

WTO rule of law has left a wide margin that members often use to manipulate trade rules to suit their home policies ranging from general exceptionsⁱ to regional groupings. GATT Article XX exempts measures from being considered WTO violations based on various domestic policy goals, including protection of public morals (subparagraph (a)), protection of human, animal or plant life or health (subparagraph (b)), customs enforcement/cross-border regulations. The Appellate Body had earlier declared that it is for the Member invoking Article XXIV as a defence or justification for by-passing basic GATT/WTO obligations to demonstrate that the Regional Trade Agreement at issue is fully compatible with Article XXIV and that the measure challenged was necessary for the formation of the Regional Trade Agreementⁱⁱ. However, the settlement of these apparently conflicting goals through exceptions to the principle put in place has recently become a primary source of international trade conflicts. In sum, these exceptions according to some legal minds are the brain behind disguised restrictions on trade and discriminatory regulations.

Keywords: Exceptions, Principle of Non Discrimination, Capacity building Tool, World Trade Organization Rules.

INTRODUCTION

The purpose of having general exceptions is to ensure that commitments undertaken by countries in the WTO do not hinder the pursuit of legitimate policy objectives. Exceptions to WTO rules give the WTO members a right to wave their commitments in the WTO. This is recognition of the legitimacy of certain social values and national security concerns of membersⁱⁱⁱ. The key in the use of exceptions is balancing values and avoiding abuse. The use of GATT Article XX or GATS Article XIV exceptions is a successful defense for a domestic policy to by When WTO members conclude free trade agreements or set up customs unions, conditions regulating the trade between the parties to the free trade agreement or the customs union may be different (e.g. more favorable) to those applied to trade with the rest of WTO membership. GATT Article XXIV provides that regional integration may be allowed as an exception to the MFN principle only if the following conditions are met: (1) tariffs and other barriers to trade must be eliminated with respect to substantially all trade within the region; and (2) the tariffs and other barriers to trade applied. In the first part of this article I will assert that Exceptions to WTO rules act as capacity building tool to member countries (I) and will also underscore that the application of these rules is faced with dilemma caused by these very exceptions(II).

JUSTIFICATION IN GENERAL EXCEPTIONS

Although the WTO Agreements aim to maintain/develop the free-trading system, they do not restrain implementation of legitimate domestic policies of member countries^{iv}. Accepting policies based on the rights of member countries to regulate without any limitation may result in abuse of protectionist measures that are taken under the pretext of policy objectives such as resource conservation or environmental protection. Therefore, in order to prevent abuse of the rights of member countries to regulate, the WTO Agreements contain provisions that coordinate the principles of trade liberalization with such rights.

A: Provisions on general exceptions

1: Article XX on General Exceptions

GATT Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to the protection of the environment: paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health paragraph of (a), or relating to the conservation of exhaustible natural resources of paragraph (g))^v (Paragraph I) followed by interpretation and testing of Two tiers(Paragraph2).

a - Necessity to protect human, animal, plant life or health and exhaustible natural resources.

Article XX (b) allows a Member to give priority to public health or environmental Policies over trade liberalization objectives since that measure is necessary to achieve those goals within the meaning of Article XX(b)^{vi}.The application of the necessity test does not take into consideration the necessity of the policy objective as such but rather the necessity of the measure to achieve those objective ^{vii}.Therefore, the conditions set out in Article XX(b) do not question the necessity of the environmental policies adopted by a WTO member.

i-Cassis Dijon-C-120 /75 against Bundesmonopolverwaltug.

On the 14th of September 1976 a company by name Rene-Zentral requested for an authorization from Federal Monopoly Administration for spirit, to import spirit drink called “Cassis Dijon». The reply was that this substance could not be sold in Germany because it did not fulfil the requirement of alcohol; wine spirit must be around 32% but the mentioned mark had only 20%. Rene therefore claimed that the act constituted a restriction to free movement of goods as per Article 37 of the EEC Treaty, and consequently brought an action against the Decision but the court suspended the action and referred the matter to the CJEU^{viii}.The Court, in an answer to the questions referred to it by the hessisches finanzgericht by order of 28 April 1978, hereby rules:

The concept of “*measures having an effect equivalent to quantitative restrictions on imports*” contained in article 30 of the EEC Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a member state also falls within the prohibition laid down in that provision where

the importation of alcoholic beverages lawfully produced and marketed in another member state is concerned.

European Court of Justice declared that there was no European Act governing the production and commercialization of these goods, therefore any country could adopt measures to protect consumers provided those measures were not disguised to discriminate against foreign goods. The disparity between state legislations was maintained under the guise of protecting public health and satisfying fairness in commercial transaction Article 36 TFEU.

ii- Thailand cigarettes case against US.

Under Section 27 of the 1966 Tobacco Act, Thailand prohibited the importation of cigarettes and other tobacco preparations, but authorized the sale of domestic cigarettes; moreover, cigarettes were subject to an excise tax, a business tax and a municipal tax^{ix}. The United States complained that the import restrictions were inconsistent with Article XI:1, and considered that they were not justified by Article XI:2(c)(i), nor by Article XX(b).

The United States also requested the panel to find that the internal taxes were inconsistent with Article III: 2. Thailand argued, that the import restrictions were justified under Article XX (b) because the government had adopted measures which could only be effective if cigarette imports were prohibited and because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. Since the health consequences of the opening of cigarette markets constituted one of the major justifications for Thailand's cigarette import regime. Thailand requested the panel to consult with experts from the World Health Organization (WHO). On the basis of a Memorandum of Understanding between the parties, the panel asked the WHO to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption.

The WHO indicated that there were sharp differences between cigarettes manufactured in developing countries such as Thailand and those available in developed countries, which used additives and flavourings^x. Moreover, locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and created the false illusion among many smokers that these brands were safer than the native ones which

consumers were quitting. Although WHO could not provide any scientific evidence that cigarettes with additives were less or more harmful to health than cigarettes without, the Panel found that the internal taxes were consistent with Article III: 2^{xi}.

b- Environmental issues under Article XX Chapeau

i- In the case WT/DS332 concerning measures affecting imports of rethreaded tyres

The EC complained that Brazil's ban was disguised protectionism for that country's tyres market in violation of several General Agreements on Tariffs and Trade (GATT) disciplines. A WTO Panel was established in January 2006 to examine the case. Brazil also claimed that such accumulation of discarded tires would create health and environmental hazards by providing breeding grounds for mosquito-borne diseases such as dengue fever, yellow fever, and malaria, and that it would be technologically impossible to dispose of such tires in its vast territory without negative environmental and health consequences^{xii}.

In conclusion the Appellate Body upheld the Panel's finding that the Import Ban was provisionally justified as "*necessary*" within the meaning of Art. XX (b). The Panel weighed and balanced the contribution of the Import Ban to its stated objective against its trade restrictiveness, taking into account the importance of the underlying interests or values^{xiii}. The Panel correctly held that none of the less trade-restrictive alternatives suggested by the European Communities constituted "*reasonably available*" alternatives to the Import Ban.

ii- US-Gasoline (DS2).

The Gasoline Rule under the US Clean Air Act that set out the rules for establishing baseline figures for gasoline sold on the US market (different methods for domestic and imported gasoline) with the purpose of regulating the composition and emission effects of gasoline to prevent air pollution^{xiv}. The US Clean Air Act and the Gasoline followed an a 1990 amendment to the Clean Air Act where the US Environmental Protection Agency (EPA) promulgated the Gasoline Rule on the composition and emissions effects of gasoline, in order to reduce air pollution in the US from 1 January 1995 . The Gasoline Rule permitted only gasoline of a specified cleanliness "*reformulated gasoline*" to be sold to consumers in the most polluted areas of the country^{xv}. In the rest of the country, only gasoline no dirtier than that sold in the base year of 1990 conventional gasoline could be sold. The Gasoline Rule applied to all US

refiners, blenders and importers of gasoline. It required any domestic refiner which was in operation for at least 6 months in 1990, to establish an individual refinery baseline, which represented the quality of gasoline produced by that refiner in 1990.

Venezuela complained to the Dispute Settlement Body that United States was applying rules that discriminated against gasoline imports. Venezuela said that it violated the National Treatment Principle and could not be justified under exceptions to normal WTO rules for health and environmental conservation measures and formally requested consultations with the United States, as required under WTO dispute settlement process^{xvi}.

The panel and the parties agreed that the policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX (b)^{xvii}.

c- The WTO Sanitary and Phytosanitary Measures Agreements.

i-The EC–Biotech Case.

In the second half of the 1990s, NGO campaigns and consumers hostility against genetically modified organism (GMOs) led the EU to impose a *de facto* moratorium on GMO approvals and imports. This was caused by a series of food and feed safety scares in Europe in the late 1980s and in the 1990s, considerable public pressure for more stringent food safety measures at the European level was the order of the day. Under pressure from farming and biotechnology sectors, the United States, Canada and Argentina in 2003 brought a WTO 16 cases against the EU's restrictions on the marketing of GMOs. At the heart of the dispute was the question whether the EU was entitled to act in a precautionary manner even though a high degree of scientific uncertainty surrounded the GMO safety debate. The use of the WTO as a forum to settle a dispute over the appropriate use of precaution in environmental risk regulation proved controversial, not the least since the Cartagena Protocol on Bio-safety had been adopted in 2000 against US resistance (Falkner 2007). Although in 2006, the WTO ruled against the EU on procedural grounds it did not pass a substantive judgment on the WTO consistency of the EU's precautionary GMO legislation as such.

ii –Korea measures on bottled water against Canada WT/DS20/1. On the 8 of November 1995, the government Canada requested for consultation following Art XXII of General Agreement on Tariff and Trade, Art 14 of the Agreement on the Application of Sanitary and phytosanitary Measures and Art 14 of the Agreement on Technical Barriers concerning certain rules and regulation of South Korea on bottled water. Canada was of the view that this rule violated Agreement on the application of Sanitary and Phytosanitary Measures in Art 2 and 5 of General Agreement on Tariff and Trade 1994, Art III and XI, Agreement on Technical Barriers to Trade Art 2.

According to Canada's internal water regulation, rules constitute an important concern in Article 8 stipulating that shelf life of bottle water is six months from its production date while Article 3 states that physical water treatment such as ,filtration, disinfection by aeration and ultraviolet disinfection are permitted but chemical treatment is prohibited. Korean government had also informed Canadian officials that disinfection by ozonation is a prohibited chemical treatment. The issue was finally solved amicably between the two parties

2-Exceptions under GATS Article XIV.

a– United States games measure against Antigua and Barbua^{xviii}.

Federal Authority put a ban on the trans-border supplies of games and Paris by Antigua toward US according to which the Act was geared toward protecting public moral^{xix}. The former complained that the measures went against the general Agreement on Commerce and service notably Articles II, VI, VIII, XI, XVI, XVII^{xx}. The Panel in its finding confirmed that members have some freedom to define and apply by themselves the concept of public morality on their territories according to their regimes and needs to protect citizens. The Panel stated that after having consulted the jurisprudences of ECJ it was noticed that many countries have used bans on product deemed adverse for consumption in order to protect their citizens and public order.

Although the Appellate Body held that the US failed to engage a diplomatic discussion with other trading partners before the ban, it on a large part sighted with the Panel's decision that the Federal law was protecting social interest following Article XX^{xxi}.

b -Argentina Financial case against Panama. On 12 December 2012, Panama requested consultations with Argentina with respect to certain measures imposed by Argentina that affected trade in goods and services. Panama alleges that various Argentine measures are applied exclusively in respect of certain countries listed in the Regulations to the Income/Profit Tax Law, Decree 1344/98, as amended by Decree 1037/00. Panama claimed that the measures are inconsistent with Articles II:1, XI, XVI and footnote 8, and XVII of the GATS; and Articles I:1, III:2, III:4 and XI:1 of the GATT 1994^{xxii}.

Regarding Argentina's defences under the GATS, the Panel found that the measures were inconsistent but the Panel further exercised judicial economy with respect to Argentina's defence under Article XIV (d) of the GATS because presumption of unjustified increase in wealth, transaction valuation based on transfer prices and payment received rule for the allocation of expenditure were found not to be inconsistent with Article XVII of the GATS^{xxiii}. The Panel further concluded:

“The protection of its tax system and the fight against harmful tax practices and money laundering were objective and utmost importance for Argentina. The Panel observed again that in any country, tax collection is an indispensable source of revenue to ensure the functioning of the State and the various government services to citizens. Protection of the national tax base guarantees the viability of a country's public finances and, by extension, its economy and financial system. The risks posed by harmful tax practices are even more important for developing countries because they deprive their public finances of financial resources vital to promoting their economic development and implementing their domestic policies. Lastly, there can be no doubt that combating money laundering, which fits in with the fight against drug trafficking and terrorism, is a priority for the international community and thus also for Argentina”^{xxiv}.

3-“special and differential treatment” (S&D) provisions.

The WTO Agreements contain special provisions which give developing countries special rights, allowing developed countries the possibility to treat developing countries more favorably than other WTO Members^{xxv}. Negotiations on special and differential provisions take place in the special session of the CTD. The negotiations have resulted in a number of decisions, such as those relating to least-developed countries (LDCs) contained in Annex F to the Hong

Kong Ministerial Declaration and the Monitoring Mechanism adopted at the Bali Ministerial Conference^{xxvi}.

a- Article XXXVI of GATT and the Enabling Clause

It provides for non-reciprocity in trade negotiations among developed and developing country Members. It is provided that developed country Members shall not seek, nor shall the developing country Members be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.

i- Generalized Tariff Preferences (GSP scheme in *European Communities - Conditions for the Granting of Tariff Preference to Developing Countries*^{xxvii}.

India requested consultations with the EC in March 2002 concerning the conditions under which the EC accords tariff preferences to developing countries under its current scheme of generalized tariff preferences (GSP scheme). India presented this request pursuant to Article 4 of the DSU, Article XXIII: 1 of the GATT 1994 and paragraph 4(b) of the so-called Enabling Clause. It considered that the tariff preferences accorded by the EC under the special arrangements, (I) for combating drug production and trafficking and (ii) for the protection of labour rights and the environment, created undue difficulties for India's exports to the EC, including those under the general arrangements of the EC's GSP scheme, and nullify or impair the benefits accruing to India under the most favoured nation provisions of Article I:1 of the GATT 1994 and paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause. In India's view, the conditions under which the EC accorded tariff preferences under the special arrangements was not provided for in paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause. On 6 December 2002, India requested the establishment of a panel.

The Panel report was circulated on the 1 of December 2003 to Members declaring: (i) India has demonstrated that the tariff preferences under the Special Arrangements to Combat Drug Production and Trafficking "*Drug Arrangements*" provided in the EC's GSP scheme are inconsistent with Article I: 1 of GATT 1994; (ii).

Consequently, the EC has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause, which requires that the GSP benefits be provided on a "non-discriminatory" basis; and (iii) the EC has failed to demonstrate that the Drug

Arrangements are justified under Article XX (b) of GATT 1994 since the measure is not “*necessary*” for the protection of human life or health in the EC, nor is it in conformity with the Chapeau of Article XX

ii-Financial assistance to developing country members.

US- Caribbean Economic Recovery Act (CBERA).United States offers duty free and non-reciprocal access to most Caribbean countries. The trade programs known collectively as the Caribbean Basin Initiative (CBI) remains a vital element of U.S. economic relations with our neighbours in the Caribbean^{xxviii}. The CBI is intended to facilitate the development of stable Caribbean Basin economies by providing beneficiary countries with duty-free access to the U.S. market for most goods in 1983. The Caribbean Basin Economic Recovery Act (CBERA) and expanded in 2000 by the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), again by the Trade Act of 2002, CBERA was implemented on January 1 1984 and was Schedule to expire on September 30th 2020. Relevant provisions in the Trade Act of 2002, the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006 (HOPE Act), the HOPE II Act of 2008, the Haitian Economic Lift Program Act of 2010 (HELP Act), and the Trade Preferences Extension Act of 2015, represents an important affirmation of the ongoing U.S. commitment to expand economic development in the Caribbean Basin through duty-free access to the U.S. market for CBI goods^{xxix}.The question remains that of knowing how far this partnership benefited both signatories.

This is followed with Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) signed on the 5 of August 2004 with five Central American countries; Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua and the Dominican Republic. The CAFTA-DR entered into force for El Salvador on March 1, 2006; for Honduras on April 1, 2006; for Nicaragua on April 1, 2006; for Guatemala on July 1, 2006; for the Dominican Republic on March 1, 2007; and for Costa Rica on January 1, 2009. When the CAFTA-DR entered into force for each of these countries, that country ceased to be designated as a CBERA and CBTPA beneficiary country^{xxx}.All these was to boost US economy instead of developing countries.

iii-Development cooperation, Political cooperation, Economic and trade cooperation

African countries and Pacific (ACP). The Cotonou Agreement. The ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000, was concluded for a 20-year period from 2000 to 2020. It is the most outstanding partnership agreement between developing countries and the EU. Since 2000, it has been the framework for EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP)^{xxx1}. In 2010, ACP-EU cooperation was adapted to new challenges such as climate change, food security, regional integration, State fragility and aid effectiveness.

The fundamental principles of the Cotonou Agreement include equality of partners, global participation (States and non-state actors), dialogue and regionalisation. The Agreement entered into force in April 2003 and was revised in 2005 and 2010 in accordance with the revision clause to re-examine the Agreement every five years. The Cotonou Agreement was designed to establish a comprehensive partnership with 3 pillars: **Development cooperation, Political cooperation, Economic and trade cooperation** (for the period 2000-2007).

iv-The European Free Trade Association (EFTA). It is an intergovernmental organization, established in 1960 by the EFTA Convention for the promotion of free trade and economic integration between its Member States today are Iceland, Liechtenstein, Norway and Switzerland, within Europe and over the globe. EFTA's first objective was to liberalize trade between its Member States. In 1972, each EFTA State negotiated bilateral free trade agreements (FTAs) with the EEC. Currently, the EFTA States have 29 FTAs in force or awaiting ratification covering 40 partner countries worldwide even outside Europe^{xxxii}. EFTA's Secretariat since 1994 has been assisting Iceland, Liechtenstein and Norway in the management of the EEA Agreement. EFTA Convention is based on common rules and equal conditions of competition and providing for the adequate means of enforcement at the judicial level. The EEA Agreement guarantees equal rights and obligations within the Internal Market for individuals and economic operators in the EEA. Currently, the EEA comprises the 28 EU Member States and the three EEA EFTA States – Iceland, Liechtenstein and Norway. The EEA EFTA States contribute towards reducing economic and social disparities in the EEA through the EEA Grants. Currently the beneficiary states include Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia. In addition to the EEA Grants, Norway has funded a parallel scheme

since 2004, the Norway Grants. The funding period covering 2014-2021 has a total financial envelope of approximately EUR 400 million per year.

B-Exceptions as hindrance to WTO laid down rules

1- Exceptions under MFN General Agreement on Tariff and Trade (GATT).

The Marrakesh protocol to GATT 1994, it was obvious that there was going to be confusion in the basic rules drafted by negotiators. This is because they failed to draft texts reflecting a friendly legal instrument on trade in goods as was agreed during the Uruguay Round^{xxxiii}. More so it is important to highlight that the Agreement making up the WTO Agreement were negotiated in multiple separate committees which operated quite separately and independently without much coordination and was therefore presented to members as **“inseparable package of right and discipline to be considered in conjunction”**^{xxxiv}. That said, for fear of tension amongst negotiators, the inconsistencies were adopted and carried forward known as **“single undertaking”**^{xxxv}.

a- Provision of SPS. *Hormones case between EC against United State, Canada and Argentina.*

From this case it is gathered that for the WTO to instruct a state on the substance of its health and safety rules is to invite **non-compliance, resentment, and conflict**. In addition, there is great disparity among states in the way they evaluate scientific evidence and in their willingness to accept health and safety risks. These differences make it difficult for a WTO panel or the Appellate Body to identify the true preferences and beliefs of states involved in a dispute, making it more likely that they will make mistake. From the above analyses it probable to draw the conclusion that WTO DSB is faced with the problem of competence; when dealing with the question of SPS, DSB or Appellate is not well suited to evaluate claims on based under scientific reasoning. Secondly, SPS measures differ from state to state and has strong link with state sovereignty and in line with the protection of citizens. s in their judgments and rulings^{xxxvi}.

b-Animal welfare in the US—Tuna dispute

Labelling law that aimed to curb the use of a controversial tuna fishing technique referred to as “setting on dolphins.” For reasons still unknown, a mysterious phenomenon in the Eastern Tropical Pacific Ocean (“ETP”) exists where schools of tuna congregate below pods of

dolphins. Once fishermen discovered it in the 1950s, they routinely exploited this relationship between dolphins and tuna. Fishing boats would locate pods of dolphins and then set weighted nets encircling the dolphins, a practice that came to be known as “*setting on dolphins.*” Once the dolphins were completely enclosed in the netting, the fishermen slowly close the circle, capturing the tuna below in the nets but also making it difficult for the dolphins to escape. As hundreds of thousands of dolphins were killed each year as a result of the dolphin sets, many more suffered physical injuries, psychological stress, and disrupted breeding patterns^{xxxvii}.

Mexico, one of the countries that continued to set on dolphins to catch tuna, formally challenged the Dolphin Safe label before the WTO in 2008, arguing that the Dolphin Safe label violated several provisions of both the Agreement on Technical Barriers to Trade (“TBT Agreement”) and the GATT^{xxxviii}. Specifically, Mexico contended that the label is a *de facto* trade ban against Mexican tuna because almost no U.S. consumer would buy canned tuna unless it had the **Dolphin Safe label** and most Mexican-caught tuna are ineligible for the label. Mexico argued that the Dolphin Safe label regime is discriminatory, does not pursue a legitimate objective, and is more trade-restrictive than necessary^{xxxix}.

c- Special and differential Treatment: Regionalism and Regulatory Cooperation in Brazil-Tyres.

GATT article XXIV allowed countries to grant special treatment to one another by **establishing a customs union or free-trade association**, provided that (1) duties and other trade restrictions would be “*eliminated on substantially all the trade*” among the participants, (2) the elimination of internal barriers occurred^{xl}.

The provision above allows preferential treatment of members in a free trade area or customs union causing deviation from the MFN provision of Article I of the GATT^{xli}. One reason why Article XXIV did not become the basis for considering **Brazil’s Mercosur** exemption is the restrictive approach to Article XXIV. The Appellate Body had taken some years before in the Turkey—Restrictions on Imports of Textile and Clothing Products (Turkey–Textiles) case^{xlii}. It is true that the concept of a free trade area or customs union as articulated in Article XXIV of the GATT clearly entails elimination of all or virtually all tariffs and related border measures between the parties. But it is far from clear that preferential treatment with respect to

regulatory-type measures “*mutatis mutandis*”, is a “*sine qua non*” of a free trade area or customs union.

Although in that ruling the Appellate Body held that Article XXIV must be strictly read to allow deviations only from the MFN obligation of the GATT and no other provision. Even when Article XXIV plays an ancillary or closely related function to the MFN obligation in sustaining the non-discriminatory character of the multilateral trading system, applying Article XXIV to regulatory cooperation in the context of a free trade area or customs union may be difficult as entire area resultantly shuts out third country producers who do not meet that standard.

2-Exception under national security and economic interest.

a- Protection of essential security interest by members under GATS. The Cuban Liberty and Democratic Solidarity Act. The US Embargo on Cuban goods, refusal and exclusion of Cuban citizens from US territory was seen by European Union as violation by United States of its obligation under GATT 1994 and GATS. European Union therefore requested consultation with US. The Dispute Settlement Body established a panel in 1996 but EU asked for the suspension of the meeting. EU continued to argue that the measure was a disguised discrimination rather than national security interest as was claimed by United States^{xliii}.

b-Security Exceptions under Article 73 of TRIPS Agreement. China-Certain Measures concerning the protection of Intellectual Property Right against.

Chinese measure disfavoured foreign patent holders from enforcing their patent rights against a Chinese joint-venture party after a technology transfer contract ends. China also imposes mandatory adverse contract terms that discriminated against and were less favourable for imported foreign technology, depriving foreign intellectual property rights holders of the ability to protect their intellectual property rights in China. Therefore foreign intellectual property right holders could not freely negotiate market-based terms in licensing and other technology-related contracts^{xliv}. On the 23rd of March United States requested for consultation in pursuant to Article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), with respect to certain Chinese measures pertaining to the protection of intellectual property rights, claiming that the measures went against WTO rules.

The Panel found out that the Law of the People's Republic of China on **Chinese-Foreign Equity Joint Ventures**, operating separately or together with other listed instruments, appeared to be inconsistent with Article 28.1(a), (b) of the TRIPS Agreement and also violated the principle of National Treatment because in Article 43 of the Regulations denies foreign patent holders their exclusive rights.

c-US – China trade war on Steel under article XXI.

On March 8 2018, US president Donald Trump announced a 25% tariff on imported steel and a 10% tariff on imported aluminium, under the claim that other countries' trade practices endanger American "*national security*" by undermining domestic production^{xlv}. Imports from Canada and Mexico have been exempted from such tariffs, and the US has indicated its openness for bilateral discussions with other countries to have similar arrangements. A WTO dispute questioning the US "*rationae materiae*" was inevitable since the tariff increase breached US commitments at the WTO under the Principle of Non Discrimination. From the reading of the Section 232 reports, the US was likely to invoke "*national security*" as a defence. China, being the largest exporter into the US, was the most affected.

Although the WTO Agreements provide for a narrowly and carefully structured "*security exception*" to trade obligations under Article XXI of the General Agreement on Tariffs and Trade (GATT 1994), the security exception somehow provides for some flexibility for a country's own evaluation of what actions are "*necessary for the protection of its essential security interests*", but does not provide firm mechanism for countries to justify any protectionist action as a matter of essential security as may be. GATT Article XXI lists three specific circumstances wherein it can be invoked, which includes actions relating to **traffic in arms, ammunition and war strategies** like traffic in other goods and materials directly or indirectly for the purpose of supplying a military establishment. All the same it is not clear as to which material liable of being used to produce arms; this lack of clarity itself is an obstacle in the application of WTO rules.

RECOMMENDATIONS

1-Bridging the disparities in regional and partnership agreements between North and South.

It has been proven through comparative analyses that there exist glaring disparities between regional and bilateral agreements signed between developed and transitional countries from those signed between developed least developed countries. For example, **The European Free Trade Association (EFTA)** is a *de facto* intergovernmental organization, established in 1960 by the EFTA Convention for the promotion of free trade and economic integration between its Member States today are Iceland, Liechtenstein, Norway and Switzerland, within Europe and over the globe. Today it comprises 28 EU member states, EFTA Convention is based on common rules and equal conditions of competition and providing for the adequate means of enforcement at the judicial level. The EEA Agreement guarantees equal rights and obligations within the Internal Market for individuals and economic operators in the EEA. Each EFTA State negotiated bilateral free trade agreements (FTAs) with the EEC. On the contrary partnership between north and South is intrinsically tight on diplomatic and colonial past taking for example the European Union–Africa Economic Partnership where specific area of interest is included in the agreement package.

2-Rethinking the Technical and financial assistance scheme for least developed and developing countries.

It is a common believe that developed countries sign technical and financial partnership agreement with developing countries that neither suite the the latter's benefit or follow up and reviewed by the WTO Trade Policy review Mechanism in accordance with its objective assisted and assisted by the Dispute Settlement Body in case of sanction. This is probably the *raison d'être* for low improvement in terms of developing countries low income economies;

i- Special and differential treatment. The SDT treatment is supposed to be accorded to all these economies at the same level. It is questionable in some cases to really access whether this *de facto* SDT applies to the rightful countries. Some scholars believed that this concept is eroded and contradictory suggesting that an “LDC+” group be introduced to capture those countries in real need of SDT and to exclude those countries which are in fact better off so they can assume full responsibilities under WTO law .According to this school of taught it was

better for fewer countries to be eligible for SDT, meaning the more substantial concession will be accorded. Others taught of country's specific evaluations; which would result in tailored packages of individual commitments, temporal exemptions and technical assistance for each developing country in the WTO.

ii-Reinforcing legal capacities of developing countries. Other ideas are rather concerned with a country's capabilities of implementing and enforcing WTO law. From there it was suggested that the criteria of who qualifies for SDT be redefined depending on a threshold specific to the application of individual rules^{xlvi}. Another arising problem was testing the Chapeau and how to fix the gap between the *de jure* system of SDT and the *de facto* outcome in the recent years^{xlvii}.

The main issue today is that of rethinking the legal position of developing countries by proving that the specific measures targeted at helping developing countries and LDCs to participate and to gain from the global market have so far not led to the expectant results intended in the negotiating round (Uruguay). *In the Technical Assistance issues (Mutual Assistance in Criminal Matters Djibouti v. France)*. France consented to the jurisdiction of the Court by a letter, on the 25 July 2006 in which it specified that this consent was valid only for the purposes of the case, within the meaning of Article 38, paragraph 5, i.e., in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" by Djibouti. However, the Parties disagreed as to the exact extent of the consent given by France. Djibouti also alleged that these acts constituted a violation of the Treaty of Friendship and Co-operation concluded between France and Djibouti on 27 June 1977. Djibouti indicated that it sought to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court asking the court to declare certain violation^{xlviii}.

iii-Review of International Monetary Fund's and World Bank loan conditionality.

Among the monetary policies (i.e. financial reforms), the IMF favors currency boards to restrict currency manipulation by monetary authorities and raise foreign net reserves^{xliv}. Related to tying monetary authorities' hands, the IMF also backs policies to reduce external and internal debt arrears, imposing curbs on available credit sources. These monetary and debt measures typically raise interest rates, increasing the cost of borrowing, and making it more expensive for businesses to expand. The Structural adjustment program in 2004 was not well taught of since many developing countries were not yet ripe for that. Closure of many industries leading

to job loss , reducing rate of state spending through salary cuts, raising prices of basic commodities only led to uprising in many developing countries. An example was the 2008 hunger rioting in major cities of Cameroon like Yaoundé and Douala from 25 to 29 February 2008^l. It is hoped that the Paris Global Financial Pact organized and Chaired by the French President will set a new tone to make financial aid meaningful for developing countries. President Macron in his speech laid down four principles *“all economic partnership between developed and developing countries must be based on; development, environmental protection, Public private partnership, and alleviation of poverty^{li}.”*



ENDNOTES

ⁱ Gabrielle Marceau, Ph.D. is Counselor in the WTO Secretariat. The opinions expressed are strictly personal and cannot be attributed to the WTO Secretariat or the WTO Members. This paper is based on a previous paper which I did with my previous colleague Ichiro Araki entitled "GATT/WTO CODE OF CONDUCT The Legal Management of International Trade Relations", first published in Global Governance, Jin-Young Chung (Ed.), 1997, The Sejong Institute.

ⁱⁱWTO Article XXIV.

ⁱⁱⁱ Azerbaijan and World Trade Organization "Basic principles of the WTO, exceptions and transparence"

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

^vWTO "Rules and environmental policies: GATT exceptions" (1994).

^{vi}"*In Thailand's – Cigarettes case the Panel examined whether Thailand's import prohibition of cigarettes – inconsistent with Article XI of the GATT 1947 – was justified under Article XX(b) and ruled: 'The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be 'necessary'.*" (ApudBossche 2006:604)

^{vii}63"*The Panel stated in the US – Gasoline case: 'It was not the necessity of the policy goal that was to be examined, but whether or not it was necessary that the imported gasoline be effectively prevented from benefiting from as favorable sales conditions as were afforded by an individual baseline tied to the producer of a product. It was the task of the Panel to address whether these inconsistent measures were necessary to achieve the policy goal under Article XX (b). It was therefore not the task of the Panel to examine the necessity of the environmental objectives of the Gasoline Rule, or of parts of the Rule that the Panel did not specifically find to be inconsistent with the General Agreement'.*" (Bossche 2006:605).

^{viii} EEC Treaty, art . 30 and 36 quantitative restrictions - measures having equivalent effect - marketing of a product - disparities between national laws - obstacles to intra-community trade - permissible - conditions and limits

^{ix}Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, BISD 37S/200.

^x*Ibid* para 52.

^{xi}*Ibid* par 86.88

^{xii} "*At the same time, we agree with the European Communities that the importance of human life and health in and of itself is not sufficient to establish that a measure is necessary for the purposes of Article XX (b). [...] Rather, we are required to assess whether the challenged measures, i.e. the specific measures chosen by Brazil in order to address this important objective, is necessary. In making this as-assessment, we must consider in particular the trade-restrictiveness of the challenged measure and its contribution to the achievement of the objective, in light of the availability to Brazil of any alternative measures.*" (Cf. Panel Report in Brazil – Retreaded Tyres case, para. 7.210).

^{xiii}"*We first recall that we have found the protection of human, animal, and plant life and health against risks arising from the accumulation of waste tyres to be an important objective. Specifically, we have found that the objective of protecting human life and health against life threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree.*"(Cf. Panel Reporting Brazil Retreaded Tyres para.7.210. Consulted 7May 2008 on: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm.

^{xiv}"*Environmental policies covered by Article XX/ WTO members' autonomy to determine their own environmental objectives has been reaffirmed on a number of occasions (e.g. in US – Gasoline, Brazil – Retreaded Tyres). The Appellate Body also noted, in the US – Shrimp case, that conditioning market access on*

whether exporting members comply with a policy unilaterally prescribed by the importing member was a common aspect of measures falling within the scope of one or other of the exceptions of Article XX. In past cases, a number of policies have been found to fall within the realm of these two exceptions: policies aimed at reducing the consumption of cigarettes, protecting dolphins, reducing risks to human health posed by asbestos, reducing risks to human, animal and plant life and health arising from the accumulation of waste tyres [under Article XX(b)]; and policies aimed at the conservation of tuna, salmon, herring, dolphins, turtles, clean air [under Article XX(g)].” (Consulted 19 May 2008 on: http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm).

^{xv}*Ibid.*

^{xvi}WTO case Nos 2 and 4. Ruling adopted 20 May 1996.

^{xvii}*Ibid.*

^{xviii}Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Internet Gambling Appellate Body Report].

^{xix}Appellate Body Report, US – Gambling, Para. 291.

^{xx}GATS, *supra*note 5, 33 I.L.M. at 1167. These Articles refer to the following: Article II: Most-Favored-Nation Treatment; Article VI: Domestic Regulation; Article VIII: Monopolies and Exclusive Service Providers; Article XI: Payments and Transfers; Article XVI: Market Access; Article XVII: National Treatment.

^{xxi}Appellate Body Report, US – Gambling, para. 296.

^{xxii}Appellate Body report and the panel report, as modified by the Appellate Body report and adopted by DSB on the 9 of May 2016.

^{xxiii}*ibid*

^{xxiv}Panel Report, Argentina – Financial Services, para. 7.681.

^{xxv}The Ministers in Doha, at the 4th WTO Ministerial Conference

^{xxvi}The Bali Ministerial Conference in December 2013

^{xxvii}WT/DS246/16/Add.3 Status Report by the European Communities Addendum 8 July 2005

^{xxviii}United States Trade Representative “Eleventh Report to Congress on the Operation of the Caribbean Basin Economic Recovery Act” 30 December 2017

^{xxix}This report uses the term “*beneficiary countries*” to refer to the sovereign countries and dependent territories that receive preferential access to the U.S. market in accordance with the provisions of the CBERA and/or the CBTPA

^{xxx}Beneficiary countries in 2014 were: Antigua and Barbuda, Aruba, The Bahamas, Barbados, Belize, British Virgin Islands, Curaçao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago.

^{xxxi}European Commission on International Cooperation and Development “*Building partnerships for change in developing countries*” Regions ;African, Caribbean and Pacific (ACP) regions 3 May 2019.

^{xxxii}Omarso T. head of information and communication Division EFTA tom@efta.int. Consulted on the 25 of May 2019.

^{xxxiii}*Ibid* GATT 1994.

^{xxxiv}*See* Appellate Body report on Argentina –Food Wear(EC) para 81. (2000).

^{xxxv}*See* Appellate Body Report in Brazil –Desiccated Coconut page 177.(1997).

^{xxxvi}Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 27, 33 I.L.M. 1125(1994) arts. 2(2), 3(3), and 5(1), 5(2), 5(3) [hereinafter SPS Agreement]. Appellate Body jurisprudence currently states that the acceptable level of risk and the evaluation of scientific evidence are not to be reviewed by a panel or the Appellate Body. See infranotes 35-36.

^{xxxvii}Lurié A. and Kalinina M. “*Protecting animals in International Trade: Study of the recent successes at the WTO and in Free Trade Agreements andrew lur*” American University International law review volume 30 /issue 3 Article 3 (2015).

^{xxxviii}In its first two decades, the Dolphin Safe label survived not only several challenges under the GATT, including one from Mexico, but also repeated attempts to legislatively amend it to allow setting on dolphins if no dolphins were injured or killed. See Panel Report, United States—Restrictions on Imports of Tuna, 7.3, DS21/R-39S/155 (Sept. 3, 1991) (not adopted) (“The tuna labeling provisions of the Dolphin Protection Consumer Information Act relating totuna caught in the Eastern Tropical Pacific Ocean are not inconsistent with the obligations of the United States under Article 1:1 of the General Agreement.”);see alsoTaking and Importing of Marine Mammals, 68 Fed. Reg. 2010-03, 2011 (Jan. 15, 2003)(announcing a “no significant adverse impact” finding in response to the question of whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the ETP); U.S.Dolphin-Safe Tuna Labeling Rule Deemed a WTO Violation, EYES ON TRADE (May 20, 2011), <http://citizen.typepad.com/eyesontrade/2011/05/us-dolphin-safe-tuna-labeling-rule-deemed-a-wto-violation.html> (describing statement of Senator Barbara Boxer, co-author of the Dolphin Safe label law, calling the Dolphin Safe label a victory because it provides the highest level of protection of dolphins). But seeEarth Island Inst. v. Hogarth, 484 F.3d 1123, 1136 (9th Cir. 2007) (rejecting and vacating the Commerce Department’s findings that fishery as having no significant adverse impact on dolphins); Panel Report.

^{xxxix}See *id* page 440.

^{xl} Article XXIV of GATT

^{xli}Appellate Body Report, Turkey—Restrictions on Imports ofTextile and Clothing Products, WTO Doc. WT/DS34/AB/R (adopted Nov. 19, 1999).

^{xlii} See WT/DS34/AB/R (adopted Nov. 19, 1999)

^{xliiii}UNCTAD-ICTSD “*Resource Book on TRIPS and Development*” Cambridge University Press (2005).

^{xliv}TRIPS Agreement Article 28.1(a), (b): “*A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner’s consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process*”.

^{xlv}*Ibid*.

^{xlvi}E.g. PROWSE,SUSAN(2002), ,The Role of International and National Agencies in Trade-related Capacity Building’, The World Economy, vol. 25, no. 9, pp. 1235-1261.

^{xlvii}See for an overview also HOEKMAN (2005).

^{xlviii}*Ibid* The facts of the case paras. 19-38.

^{xlix} IMF 2004.

^l Julius A. Amin “*Cameroonian Youths and the Protest of February*” Journal article 2008.

^{li} Paris Summit “*For a New Global Financing Pact*” at the Palais Brongniart on 22-23 June 2023.