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Role of WTO in Balancing Trade, Environment, Public Health and Sovereignty

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***Abstract*— This paper examines the role of World Trade Organization (WTO) in balancing the nexus between trade liberalization, environmental protection, public health safety and sovereignty. The paper analyses seven WTO cases by analyzing the cases on US-Gasoline, US-Shrimp, US- Clove Cigarettes, EC-Asbestos, Australia-Tobacco Plain Packaging, Australia-Apples, Canada- Pharmaceutical Patents which were lodged to Dispute Settlement Body in various grounds of trade restrictions. This study considers the legal elements of GATT/WTO 'exceptions' to non-discrimination principles with regards to health concerns (human, animal, plant) and evaluate its interpretation and practical scope of application in the WTO cases. A cautious analysis of the rulings reveals that governments may pursue environmental and health goals if they do not discriminate among their trade partners and can provide scientific support for their regulations.**

***Keywords*—International Trade, WTO, GATT, Public Health, Environment.**

I. Introduction

Since its inception, the World Trade Organization(WTO) has been challenged to strike balance between its goal of progressive trade liberalization and protection of health concerns across human, animal and plant life. This paper provides an analysis of legal components of GATT/WTO 'exceptions' to non-discrimination principles by taking into consideration of WTO cases regarding health concerns of human, animal and plant life. An evaluation of the interpretation and practical scope of application of the "exceptions" rule will be provided in various cases. WTO members are obliged to comply with several general rules according to General Agreement on Tariffs and Trade 1994 (GATT 1994). Principle of non-discrimination is at the heart of WTO regulation. The Most-Favored-Nation (MFN) principle requires the WTO members to treat every WTO member equally regarding all imported like products. The National treatment principle requires a WTO member to provide equal treatment between imported and domestic like goods. Regarding market access for goods, all members must follow their scheduled commitments on tariffs and should not apply tariffs beyond the bound levels unless renegotiated otherwise. In addition, it is not allowed to impose quantitative restrictions (QRs) on market access for goods by a WTO member. Furthermore, all members should ensure that their non-tariff barriers (NTBs) (such as import licensing) do not impose unnecessary restrictions to trade.

However, under certain exceptional circumstances, WTO Members can deviate from these obligations, if they conform with certain conditions. This paper will focus on the general exceptions to non-discrimination principles in light of protection of health concerns (human, animal and plant).

This paper begins with a general introduction about the GATT/WTO exception and the relevant chapeau test. Then it analyse the health concerns through cases regarding Technical Barriers to Trade(TBT), Sanitary and Phytosanitary Measure(SPS) Agreement and TRIPS. It ends with summarizing the intertwined factors throughout the cases with a brief critique.

II. Literature Review and Methodology

This study mainly relies on seven WTO disputes and relevant journal articles, commentaries and books. Other reference materials like reports and websites were also useful in building the arguments.

A great deal of literature of exists in the Academia on the WTO dispute settlement system. However, this paper will specifically focus on how "exceptions" to Non-Discrimination principle evolved around the WTO jurisprudence to balance between trade, environment, health and sovereignty of member states.

III. GATT/WTO Exception : Environment aand Health Concern

General Exceptions (Article XX of the GATT 1994 and Article XIV of the GATS) permits a WTO member to take measures otherwise barred by GATT 1994 regulations, subject to specified conditions. There are no general exceptions for health concerns under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, it permits measures necessary to protect public health and nutrition, provided they are consistent with other TRIPS provisions (TRIPS, Article 8 - Principles) [1].

Article XX of the GATT 1994 establishes the use of the general exception for trade in goods which allows WTO

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members to take certain measures. For example, it permits a member to apply measure to protect public health or plant/animal life. However, the measured must not be devised to impose arbitrary or unjustifiable restriction on trade between the countries where similar conditions exists. Article XX on General Exceptions mentions a number of specific circumstances under which WTO parties may be exempted from WTO rules[1] . Two of these are related to environmental protection. Article XX states:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same countries prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health; . . . [or] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...."[2]

However, any measure taken under Article XX should be consistent with the Article XX's introductory clause or Chapeau which discourages the abuse of exceptions. It is noteworthy that , the Appellate Body(AB) Report has specified that the exceptions listed in Article XX -paragraphs (a) to (j) relate to all the obligations under the GATT 1994 (including not only the MFN and national treatment principles, but others as well) (US – Gasoline, Appellate Body Report, p. 24 [2]; US – Shrimp, Appellate Body Report, para. 121[3]).

Structure of the Two-Tier Test:

To be justified under Article XX, any GATT 1994-inconsistent measure must go through a two-tier test:

> Step 1: The measure at issue must fall under one of the exceptions – sub-paragraphs (a) to (j) – listed under Article XX - each sub-paragraph concerns different objectives and contains different requirements; and,
>
> Step 2: The measure must be applied in a manner that meets the requirements of the Chapeau of Article XX. (US – Gasoline, Appellate Body Report, p. 22)

A closer look at the US-Gasoline case and US-Shrimp case can be taken to compare how the interpretation of "general exceptions" evolved in WTO Disputes.

A. US Gasoline Case

In US-Gasoline case, Brazil and Venezuela challenged US set more stringent reformulated gasoline standards for foreign refiners than for domestic ones. Promulgated by Environmental Protection Agency (EPA), the US Gasoline rule, allowed sale of gasoline with specified cleanliness to consumers. The US argued to enact such regulation to reduce air pollution in the US. This regulation to implement the Clean Air Act was aimed at reducing Air pollution which is detrimental to human health.

The complainants challenged that such measure was inconsistent with GATT Article III which requires treating both domestic and imported products equally [4]. In addition, the complainants further reasoned that this regulation is not justified as a general exception under Article XX of GATT 1994.

Gasoline Case is significant in the history of the WTO, as the AB adopted a two-tier test to establish relationship between GATT Article XX exceptions and the Chapeau [5] . The AB concluded that the Gasoline rule was inconsistent with GATT Article III because the US treated imported gasoline "less favourably" than domestic gasoline.

The AB overturned the Panel's reasoning and concluded that the US Gasoline rule meet the requirements of the scope of Article XX(g). However, the AB concluded that measure was still unjustified under Article XX as the measure constituted "unjustifiable discrimination" and "disguised restriction on international trade "under the Chapeau of Article XX. In August 1997, the US changed its emission regulations to comply with the AB ruling on the case.

B. US Shrimp Case

The US-Shrimp case arose due to the US import ban on shrimp and shrimp products from countries without adequate national policies to protect endangered sea turtles from drowning in shrimp trawling nets[6]. This import ban followed a specific regulation which required all shrimp exporting countries to US to implement the specific measure of using "Turtle Excluding Devices (TED's)" as used by US while catching shrimps. Pakistan, India, Thailand and Malaysia challenged this measure at WTO arguing that section 609 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990 and the guidelines for its implementation had violated articles I(1), XI(1), XIII(1), XX(b), and XX(g) of the GATT [7] . India claimed such unilateral imposition of regulation as "an unacceptable interference with the sovereign jurisdiction of India"[7] .

The United States defended the policy in light of Article XX(g) which exempts measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." The AB concluded that the US policy fell within the scope of article XX(g) concerning the conservation of natural resources but that was applied in a discriminatory fashion contrary to the Article XX chapeau[3] . The AB found the measure was imposed in 'arbitrary or

[1] See GATT art. XX.

[2] Article XX also has exceptions for measures to protect or promote: public morals; the preservation of national artistic and archeological treasures; customs enforcement; competition laws; patents, trademarks, and copyrights; to block the importation of products of prison labor; and so forth.

unjustifiable' way as the US measure discriminates based on process and production methods that are not associated to the product itself.

In the Shrimp case, the Appellate Body broke new ground in WTO jurisdiction by stating that text of Article XX(g) covers not only the conservation of "mineral" or "non-living" natural resources, but also living species, which are in principle "renewable", and are in certain circumstances indeed vulnerable to depletion, exhaustion and extinction, frequently because of human activities[3] .

The AB ruled in favour of the complainants as U.S. measure qualified for provisional justification under Article XX(g) but failed to meet the non-discrimination requirement according to the chapeau of Article XX [8]. This case is considered as a milestone decision which highlighted a optimistic trend in international trade law for environmental protection through unilateral trade bans [9].

In the US-Gasoline case, "The AB concluded by holding the United States at fault not for its policy, but instead for its process in implementing the policy. The Appellate Body found "two omissions" by the United States: (1) failing to adequately explore a less discriminatory policy; and (2) failing to consider the burdens on foreign refiners"[10] .

In case of US-Shrimp, "the Appellate Body analysed not for the "least trade restrictive" option, but instead at whether the United States' embargo on shrimp constituted "arbitrary" or "unjustifiable" discrimination under the ordinary meaning of the chapeau of Article XX" [10].

While the above two cases looked into the health concern of human and animal in light of GATT article XX exceptions, let's turn into cases regarding technical regulations related to human health.

IV. Technical Barriers to Trade(TBT) Agreement and Health Concerns

According to the TBT Agreement, all WTO members reserves the right to restrict trade to pursue "legitimate objectives". "These legitimate objectives include the protection of human health or safety, the protection of animal or plant life or health, the protection of the environment, national security interests, and the prevention of deceptive practices. The TBT Agreement applies to product requirements which are compulsory ("technical regulations") as well as voluntary ("standards") [4] . It covers such requirements developed by governments or private entities, whether at the national or the regional level" [11].

The TBT Agreement highly encourages the use of international standards. But, members may choose otherwise if they consider that application of that international standard would be inappropriate for the fulfilment of specific legitimate objectives.

A brief look at the US-Clove Cigarettes, EC-Asbestos Case and the Australia- Tobacco Plain Packaging case can be considered to see how human health concerns were treated in the WTO in light of TBT agreement.

The US-Clove Cigarettes case was put forward by Indonesia challenging the United States tobacco control measure prohibiting cigarettes or any of its parts, containing an artificial or natural flavour, including clove, vanilla, coconut, etc (other than tobacco or menthol), regarding public health[12]. Indonesia claimed that Indonesian imported clove cigarettes suffered from less favourable treatment than that of domestic menthol cigarettes which was inconsistent with the Article 2.1 of the TBT Agreement and Article III:4 of the GATT[13].

The AB upheld the Panel's finding regarding the likeness of imported clove cigarettes from Indonesia and United States' domestic menthol cigarettes, although through different reasoning, that the determination of likeness under Article 2.1 of the TBT Agreement was a determination about 'the nature and the extent of a competitive relationship between the products', based on analysis of the traditional 'likeness' criteria[14] .

On the issue of non-discrimination principle. the AB upheld, although for different reasons, the Panel's finding that, by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) provided discriminatory treatment to imported clove cigarettes that it favoured to 'like' domestic menthol cigarettes[15].

The AB interpreted the terms 'treatment no less favourable' in Article 2.1 of the TBT Agreement as not barring a harmful impact on imports when such impact emanates exclusively from a legitimate regulatory distinction and found that the design, architecture, revealing structure, operation and application of Section 907(a)(1)(A) strongly implied that the harmful impact on competitive opportunities from clove cigarettes reflected discrimination against the group of like products imported from Indonesia[16].

Also regarding exceptions to WTO obligations, the US-Clove Cigarettes, after the Panel concluded that it was not necessary to assess any arguments under the GATT as the panel established the violation of TBT Agreement[17].

The EC-Asbestos[18] case is a landmark WTO case which upheld France's asbestos ban. The case was initiated when Canada took France to WTO regarding France's ban on asbestos (Decree No. 96-1133). The asbestos ban was initiated on the ground of protecting human life from detrimental impacts of asbestos.

The AB upheld the panel's finding that the French ban was justified under Article XX(b) of the GATT which provides a general exception to WTO rules for measures necessary to protect human health and the measure satisfied the conditions of the Art. XX chapeau, as the measure neither led to "arbitrary or unjustifiable discrimination", nor constituted a "disguised restriction on international trade".

[3] US – Shrimp, Appellate Body Report, para. 128
[4] Annex 1, paragraphs 1 and 2 of the TBT Agreement defines these two concepts.

However, the AB reversed the panel's reasoning that asbestos and other, less dangerous alternative fibres are "like" products as defined by Article III:4 of GATT and should in principle receive the same treatment on the French market. Appellate Body report stated, "We are very much of the view that evidence related to the health risks associated with a product may be pertinent in an examination of the 'likeness' under Article III:4 of the GATT 1994."[19]

A very recent addition to the WTO's panel report on Australia- Tobacco Plain Packaging (TPP) [5] case further stresses WTO's strong footing in the protecting human health . The Panel concluded that TPP policy is a technical regulation under the TBT agreement and do not imposes any unnecessary restriction to trade. The panel repeatedly emphasized Australia's holistic approach towards its domestic multifaceted tobacco control policy . This verdict was a big step towards Australia's public health policy. Furthermore, it also highlighted WTO's stance on protecting public health.

v. Sanitary and Phytosanitary Measure(SPS) Agreement and Plant Health:

SPS Agreement enables countries to restrict trade to ensure food safety and the protection of human life from plant- or animal-carried diseases (zoonoses). The SPS agreement recognizes the members right to choose their level of health protection as they deem appropriate and ensures that a SPS does not constitute unnecessary, arbitrary, scientifically unjustifiable, or disguised restriction on international trade. It gives a member the right to implement measure which can lead to higher level or health protection or measures focused on health concerns for which international standards do not exist. However, this measures must be scientifically justified. As discussed earlier, the GATT Article XX(b) provides exemption for measures necessary to protect human, animal or plant life or health is directly relevant. However, the SPS Agreement is more precise in this regard as a fundamental requirement is that members must be able to justify the measure through scientific evidence and there exists a risk to health which justifies trade measures not based on international standards.

Let's look at the Australia-Apples[6] case to see how SPS measures related to plant life were treated in the WTO dispute. In 1921, Australia first imposed a ban on New Zealand apple imports to prevent the spread of 'fire blight'. The fire blight is a bacterial disease that damages apple trees and reduces their fruit production ability.

The AB concluded that Australia's import risk assessment and various measures did not fully consider scientific evidence, production methods, characteristics of pests and diseases, and environmental conditions, and failed to fully demonstrate the possibility of pest and disease transmission. Thus, Australian's measures were inconsistent with Article 2.2; Article 5.1 and Article 5.2 of SPS agreement.

Secondly, the panel found that New Zealand failed to demonstrate that the measures at issue were inconsistent with Article 5.5, consequently, also failed to demonstrate inconsistency with Article 2.3 of the SPS Agreement. Moreover, the SPS agreement requires that alternative solutions must take into account technical and economic feasibility, achieve appropriate levels of health protection, and limit trade to significantly lower than existing measures. "The Panel concluded that Australia's measures relating specifically to the three pests at issue were inconsistent with Art.5.6, and that New Zealand failed to demonstrate that the three "general" measures were inconsistent with Art. 5.6. Australia appealed these findings only in regard to two of the three pests (fire blight and ALCM). The Appellate Body reversed the Panel's findings of inconsistency in regard to the measures relating to these two pests but was unable to complete the legal analysis of New Zealand's claim. Therefore, Australia's measures on the three diseases violated Article 5.6 of SPS agreement but did not violate the general measures[20] .

Moreover, the AB upheld the most of New Zealand's arguments challenging the validity of the scientific and risk assessments done by Australia for the imposing SPS restrictions. This verdict enabled to uplift a 90 year ban on Kiwi Apples and boost international trade between the countries.

vi. TRIPS and Exceptions

Under the TRIPS Agreement, governments can make limited exceptions to patent rights complying with specific conditions. Such exceptions should neither "unreasonably" conflict with the "normal" exploitation of the patent nor unreasonably prejudice the legitimate interests of the patent owner, considering the legitimate interest of third parties (Article 30). In the Canada-Pharmaceutical Patents[21] case, the European Communities challenged Canada's regulation which promoted the development of generic drugs. The EU challenged the measure on "certain provisions under Canada's Patent Act: (i)"regulatory review provision (Sec. 55.2(1))"2; and (ii)"stockpiling provision (Sec. 55.2(2))" that allowed general drug manufacturers to override, in certain situations, the rights conferred on a patent owner"[21] . Canada defended its policy by invoking exceptions provided in the Article 30 of TRIPS. The panel found the stockpiling provision could not be justified under Article 30. However, "the Panel found that Canada's regulatory review provision was justified under Art. 30 by meeting all three cumulative criteria: the exceptional measure (i) must be limited; (ii) must not "unreasonably conflict with normal exploitation of the patent"; and (iii) must not "unreasonably prejudice the legitimate interests of the patent owner", taking account of the legitimate interests of third parties. These three cumulative criteria are necessary for a measure to be justified as an exception under Art. 30"[21].

This ruling was a significant victory for Canadian policymakers, generic manufacturers and consumers "because

[5] Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
[6] Australia – Measures Affecting the Importation of Apples from New Zealand

the ability to work patents accelerates the introduction of generic drugs to a far greater extent than stockpiling"[22] .

VII. Binding the cases together : Trade, Health, Science in Action

Comparing the Gasoline and Shrimp case, it is evident that the AB adopted a broader approach to "exhaustible natural resources" to analyse Article XX exceptions. The consistency of AB strengthens the rule of GATT law and gives WTO a more authoritative stance showing that disguised restriction on international trade is assessed meticulously in WTO jurisprudence.

Though health is not a key mandate of WTO, the rulings over Asbestos and Tobacco Plain Packaging shows trade cannot be expedited at the expense of human health. If we consider the Australia-Apples case, it is evident that the WTO adheres to strict scientific justification in considering a SPS measure.

If we compare the Asbestos and Generic Drugs case, the asbestos rulings upheld France's asbestos ban, and the generic drugs rulings approved Canada's "early working" exception to patent rights . These verdicts confirmed WTO members' right to restrict trade and patent rights to promote public health, but the reasoning used was quite different from the overall outcome of the cases.

On the other hand, "The generic drugs panel's narrow interpretation of patent rules ignored provisions allowing governments to balance patent holders' interests with those of other members of society (TRIPS Articles 7 and 8) and emasculated provisions permitting compulsory licenses (TRIPS Article 31) and exceptions to patent rights (TRIPS Article 30)"[23] .

Moreover, the above analysis of disputes demonstrate WTO's role in assessing non-discrimination and scientific-justification requirements play balancing role for both protection of environment, health concern and progressive trade liberalisation without compromising the sovereignty of the member states.

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