Principles of the wto

The General exceptions provide a list of measures that countries can enforce. These measures are a necessity[1]to protect basic and fundamental socio-economic and political interests to protect the character and integrity of a nation. The term necessary was discussed by a previous panel albeit in context to article XX (d) and held that a contracting party could not justify a measure inconsistent with GATT as necessary if there were reasonable available alternative measures that were less inconsistent with GATT provisions.[2]

Trade liberalization being the fundamental objective of the WTO comes in direct conflict with national policies and interest of member states article XX of GATT provided exceptions that serve as justification for member states to enforce measures for safeguarding their interests.

The WTO's founding and guiding principles remain the pursuit of open borders, the guarantee of most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities[3].

The pursuit of a free market and open trade creates a conflict of interest on a national and international level. National policies implemented by governments occasionally do not conform to products and ideals of the international market, an example can be seen between western and eastern governments whereas betting as an industry is accepted in most of the countries, Islamic states such as Pakistan do not allow betting and as such foreign investors cannot run gambling businesses as gambling is prohibited

under sharia law. What is generally accepted in one geopolitical area is not considered a norm by another state.

It then becomes a challenge to maintain a balance between policies that are a government's legitimate objectives and non-discrimination against foreign competition and objectives that are inconsistent with the ideals of free trade.[4]

The appellate body in US-Shrimp best summarized this by stating;

" a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members"[5]

Chapeau

Article XX consists of a preamble called the *chapeau* and subsequent subparagraphs.

The Chapeau was introduced into the exceptions article of the commercial policy chapter of the draft ITO Charter during the London session of the Preparatory Committee a delegation in the conference suggested that uncertainty in the protection clause is not desirable as it leaves these provisions open to abuse. To prevent abuse this excerpt to article 32[XX] was introduced[6];

' The undertakings in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any Member of the following measures, provided that they are not applied in

such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.”

The suggestion was generally accepted subject to its review to the wording specifically on whether the scope should be limited to import and export restrictions.[7]The amendments were made and the GATT was signed on the 1947 in Geneva and came into effect in 1948, which eventually led to the Uruguay round agreement establishing the WTO in 1994[8].

The historical map of the chapeau is significant as it highlights its objective. Concisely, the chapeau is in place to prevent abuse of the exceptions under article XX to justify a measure that is inconsistent with the General agreement. The chapeau combats this problem through two requirements that must be met by a member invoking the exception. First a measure provisionally justified under one of the sub-paragraphs of article XX must not be applied in “ arbitrary or unjustifiable discrimination” means between countries where the same provisions prevail. This condition involves a prohibition on any measure that has a disproportionate economic impact on products from certain countries when compared to its impact on competitive products from other countries.[9]

In Us-Shrimp, the appellate body laid out conditions that must exist for ‘ arbitrary or unjustifiable discrimination’ to be established (1) the application of the measure at issue must result in discrimination;(2) this discrimination must be arbitrary or unjustifiable in character; and (3) this discrimination must occur between countries where the same conditions prevail.[10]

The Similar conditions test however will in essence fail in instances where the factors relevant to the measure are significantly different. However in US-Shrimp(1998) the Appellate body held that in circumstances where different conditions between countries prevail, the rigid and inflexible application of the measure may constitute and *‘ arbitrary discrimination’.* [11]The second Justification is discretionary in nature, it is independent of the objective in measure. The effect of this dual justification is to enhance the regulatory autonomy of WTO members.[12]

Secondly this measure must not be applied in a manner that constitutes a “ disguised restriction on international trade”[13]. This measure is not clear and panels have not been able to find a certain means on clarifying on the same. It is difficult to ascertain the objective of a measure as the Appellate Body found in Japan-Alcoholic Beverages (1996).[14]However in US-Gasoline (1996)[15]the panel held that disguised restriction can be identified when read with ‘ arbitrary discrimination’ and ‘ unjustifiable discrimination’. The disguised restrictions amount to arbitrary or unjustifiable discrimination in international trade when taken under the under the guise of a measure formally within the terms of an exception listed in Article XX.. The test used to determine the presence of ‘ Arbitrary or unjustifiable discrimination can be used to identify disguised restrictions.

The Panel in EC-Asbestos (2001) stated that a restriction which formally meets the requirements of Article XX(b) will constitute and abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives.[16]

These requirements ensure that members submit substantive legitimate claims that do not prejudice the rights of other members to the treaty. Article XX should not be used as a disguise to abscond from the obligations of the general agreement but as an avenue to maintain the balance between rights and obligations of the members to the General agreement.

Article XX reflects on the principle of good faith. It ensures fair dealings are undertaken through the obligations of the general agreement. It instils a sense of Duty on the members to respect each other’s rights while giving them an avenue to further their objectives on a national level[17].

However despite the attempts to limit abuse of the provision, the general exceptions have become the subject of most WTO disputes.

In *US-Gasoline (1996)* the appellate body stated the exceptions under article XX can be invoked as a matter of legal right, however caution should be taken in its use. The exception should not be used in a manner that frustrates the legal obligations of the holder in the General agreement. The provision must be applied reasonably with due regard to the party claiming the exception and the legal rights of the other parties concerned[18].

From the above analysis, the Chapeau was introduced as a firewall. It provides a legal justification for measures that meet the requirements listed in it. The application of the same becomes a subject of dispute as it is difficult to satisfy all the members due to conflicting interests. The Appellate body in US-Shrimp year? addressed the ideal means of application by stating;

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e. g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

The chapeau should be used as a balancing provision, on one hand it provides a right for members to invoke an exception to protect their National interests and on the other hand it should ensure members meet their obligations. The margin that separates the two is not fixed, it is based on the circumstances of each case. An objective? Approach is taken considering the prevailing conditions of each case to ensure the appropriate equilibrium is maintained.

Article XX can be invoked by a member when a measure has been found to be inconsistent with another GATT provision, this will be a justification of the inconsistency and will have to be backed with evidence to disprove the claim. Article XX can be construed to be an Omnibus Clause as it covers all provisions in the GATT 1947. The wording of the preamble, reflects the same ‘ nothing in this agreement shall be construed to prevent the adoption or enforcement of measures…’

In *US-Section337 Tariff Act (1989)* stated that measures satisfying the conditions set out in article XX are permitted even if they are inconsistent with other provisions of GATT 1947. Article XX however provides limited and conditional exceptions listed in the respective sub paragraphs inconsistent with another provision of the General agreement.[19]The conditional limitations serve two functions, first they are necessary to maintain a balance between obligations under GATT and National Policies, and secondly they prevent abuse of the obligations under the guise of protectionism[20].

Article XX can be invoked by a member only when a measure by that member has been found to be *prima farcie* [21]inconsistent with another provision the complaining party has to submit sufficient evidence supporting this claim, the burden then shifts to the defending party that has to provide evidence to disprove this claim. The burden of proof to show that a measure has been violated lies with the party invoking it in *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* [22]and the *1994 report in United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* [23]

In the former the panel concluded that with the exception of the listing and delisting of practices in Ontario, the United States had not substantiated its claim that Canada still maintained listing and delisting practices inconsistent with Article XI of the General Agreement.

The latter In view of the Panel's analysis, the Panel considered that the evidence did not support the complainants' claim that the DMA's penalty provisions were separate taxes or charges within the meaning of Article III: 2

furthermore the Panel concluded that the evidence did not demonstrate that Section 1106(c), Fees for Inspecting Imported Tobacco, mandated action inconsistent with Article VIII: 1(a) of GATT 1947.

Both cases reflect the Panel's Jurisprudential approach on the burden of proof in which previous and subsequent panels have maintained that the burden of proof rests on the party making a complaint, the burden then shift to the defending party that has to provide evidence to disprove this claim.

Jurisprudence from the AB has laid down a two-tier test for the application of Article XX in a dispute. In *US Gasoline 1996* the Appellate Body established the two-tier test involved a provisional justification by reason of characterization of the measure and appraisal of the same measure under the introductory clauses of Article XX[24]

First, a Panel has to consider whether the respective measure falls within the scope of subparagraphs (a) to (j) In AB report in *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beej* [25];

The Panel focussed on whether the dual retail system is necessary to ensure compliance with the law under the *Unfair competition Act* which on the face of it was inconsistent with provisions of the WTO. It examined enforcement measures where fraudulent misrepresentation has occurred and found that the dual retail system was not used. Instead Korea used a traditional enforcement system which was reasonably available and as such it could not fall under Article XX (d) and as such could not justify the dual retail system as a necessity under Article XX (d). A measure has to be within the scope of Article XX for it to be enforceable.

The second test is whether a measure meets the requirements of the *chapeau* under article XX, and was necessary to achieve the respective objective.

In AB report in European Communities – *Measures Affecting Asbestos and Asbestos-Containing Products* [26] *;*

The AB disagreed with the panel's findings that considering the evidence relating to health risks associated with the product, under Article III: 4 nullifies the effect of Article XX (d) of GATT, It however held that Article XX (d) allows members to ' adopt and enforce' a measure, Inter alia necessary to protect human life and health although that measure is inconsistent with another provision. Under Article III: 4, evidence relating to health risks may be relevant in assessing the competitive relationship in the marketplace between allegedly " like" products. The same, or similar, evidence serves a different purpose under Article XX (b), namely, that of assessing whether a Member has a sufficient basis for " adopting or enforcing" a WTO-inconsistent measure on the grounds of human health.

This ruling sheds light on the authority of article XX in GATT, if a measure satisfies the requirement of the chapeau and is inconsistent with another article in the Agreement, a member will be able to adopt and enforce a measure to achieve the objective that is, in this case to protect, human life. The end justifies the means.

Articles under GATT should be interpreted independently and with respect to the relevant provision. The AB held that provisions satisfy the article XX if

they are necessary to adopt and enforce a necessary measure under Article XX (a)-(j)……..

It is a generally accepted principle of interpretation that exceptions are to be interpreted narrowly under the principle of *(singular non sunt extendena)* [27]however the Appellate Body has adopted a flexible approach in *EC-Measures Concerning Meat and Meat Products (Hormones) 1998* , the Appellate Body stated that characterizing a treaty provision a an exception does not justify a stricter or narrower interpretation of that provision[28].

Jurisprudence shows that AB’s have adopted a less restrictive approach in a way that balances between commitments and exceptions. This approach takes after the ordinary meaning of interpreting treaties where a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose[29].

This Approach was used in the US Gasoline (1996) and US-Shrimp (1998) where the panel stated that:

the context of article XX (g) includes provisions of the rest of the *General Agreement* including particular Article . conversely, the context of Articles… includes Article XX, accordingly, the phrase @relating to the conservation of exhaustible natural resources’ may not be read so expansively as seriously to subvert the purpose and object of Article II: 4. Not may Article III: 4 be given so broad a reach as effectively to emasculate Article XX (g) and the policies and interest it embodies. The relationship between the affirmative commitments set out in e. g. Articles I, II and XI, and the policies and

interests embodied in the General Exceptions listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO members themselves to express their intent and purpose[30].

The approach taken by the AB entails to maintain a balance between it then takes various factor in consideration, first it aims to facilitate the fundamental WTO objective of trade liberalization, second balancing member interests, General rules of interpretation, which inter alia include giving light to the context and meaning of the preamble.

SCOPE

As discussed earlier on, it is clear that article XX is a universal exception and the scope of application is broad. Article XX unlike other exceptions is not interpreted in the strict and narrow sense.[31]

The main question that has arisen is whether article XX can be used to justify inconsistencies with obligations set out in Agreements other than GATT 1994.[32]

To understand this scope of article XX in this context it is essential to understand its historical objective. During the GATT negotiations, the negotiators took the a la carte approach, which meant that members could not choose particular items but had to take everything that was offered, in contrast, during the Uruguay rounds the negotiators introduced the ‘ single

undertaking' approach, where membership of the WTO was made contingent on accepting all treaties as a package.[33]The members had to Join all agreements administered by the WTO[34]. The aim of the shift was to consolidate disciplines negotiated in earlier rounds to all WTO members.

The single undertaking idea is ingrained in the WTO ideology, it was introduced to curb fragmentation of international agreements (a La Carte). as a consequence all agreements under annex 1A of the WTO Charter were consolidated to into one document, the WTO Charter.

There is no express provision in the GATT 1947 or any of the agreements under annex 1A that shows a correlation between the two. However in the event of a conflict between the two the latter shall take precedence. *Lex specialis* agreements take precedence over *Lex generalis* agreements[35].

The ambiguity on this contentious issue was shown in the AB report *United States -Measures relating to shrimp from Thailand (DS343), United states-Customs Bond Directive for merchandise subject to Anti-Dumping/countervailing Duties* [36]. India raised a valid point by questioning whether a defence under Article xx (d) was available to the United States to justify a measure found to constitute a " specific action against dumping" under Anti-Dumping agreement. The panel answered this by stating " we do not express a view on the question of whether a defence under Article XX (d) of the GATT 1994 was available to the United States." The panel failed to give a definitive answer.

However most recently in the in *China-Publications and Audio-visual products* [37]China invoked Article XX (a) to Justify the inconsistent " trading

rights commitments” in paragraph 5. 1 of China’s Accession protocol. As in the Case of the *US-Customs Bond directive* [38]the panel decided to first measure whether the measures met the requirements of Article XX (d) rather than expressly on the availability of Article XX as a defence.

However the Appellate Body did provide a definitive answer and criticized the panel’s reliance on the *arguendo* in answering the in question.[39]The Body observed that the provisions that China seeks to justify have a clearly discernible, objective link to China’s regulation of trade in the relevant products. In the light of this relationship between provisions of China’s measures that are inconsistent with China’s trading rights commitments, and China’s regulation of trade in the relevant products, we find that China may rely upon the introductory clause of paragraph 5. 1 of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX (a) of the GATT 1994. In light of the above China could rely on Article XX to Justify measures in a WTO agreement other than GATT 1994 in this case, China’s accession Protocol.

Specific Exceptions under Article XX of the GATT 1994

Subparagraphs (a)-(j) of Article XX lists detailed and specified exceptions for measures inconsistent with other provisions of GATT 1994. The specified exceptions provide a comprehensive list of grounds[40]that can be used to justify an inconsistent measure. The wording of various terms in the exceptions denotes a difference objective. As analysed in *US-Gasoline* the appellate Body stated that:

In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories.

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.

Each and every subparagraph enjoys a certain amount of autonomy, in this respect they serve a different purpose and as such should be interpreted in their ordinary meaning in accordance with the general rules of interpretation.

Article XX (a)

On the offset, the issue of public morals and international trade proves to be a problematic. Public morals differ between states, the relativity is bound to conflict with norms and rules set out in international practice.

Article XX(a) as an exemption is designed to allow a nation to participate in the international trade while preserving certain aspects of its sovereignty over it’s domestic, political and legal order.[41]It is a provision that maintains self-preservation.

The issue of public morals invites a sense of ambiguity, broadening its scope of application, it becomes important to underline a basis for an interpretation of it's meaning within the context of international trade.

The problem is there have been few decisions and scholarly articles touching on this exception.[42]

In US-Gambling (2005) the stated that the term public morals denotes standards of right and wrong conduct maintained by or on behalf of a community or nation, the content of the concept of public morals can vary from member to member, depending upon a range of factors, including prevailing social, cultural , ethical and religious values and members should be given some scope to define and apply for themselves the concept of public morals in their respective territories, according to their own systems and scales of values.

This definition was adopted by the panel in China-Publications and Audio-visual products (2010). The panel then set the ground work for a GATT inconsistent measure to be justified under Article XX(a) it stated the measure must be designed to protect public morals and necessary to fulfil the that policy objective.[43]

The lack of jurisprudence with this article is bound to create problems in the future. It is clear that it is impossible to set a baseline for what is morally right or wrong. This exception is solely aimed at maintaining the sovereign integrity of a member.

Article XX (b)

The scope of paragraph XX (b) is not definitive however it is clear that sanitary and phytosanitary measures were the principal measures that occupied the minds of the drafters[44]This is clear in the Sanitary and Phytosanitary Measures (the Sps Agreement) where the preamble states; Preamble to the Sps Agreement that refers to Article xx (b): " Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article xx(b)"

This article concerns measures that are ' necessary to protect human, animal or plant life or health'. Jurisprudence on the application of Article XX (b) relies on three requirements:

(i) Whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of " protecting human … life or health". In other words, whether the measure is one designed to achieve that health policy objective; (ii) whether the measure is " necessary" to achieve said objective; and (iii) whether the measure is applied in a manner consistent with the chapeau of Article XX.[45]

The requirement is relatively straightforward and hasn't created problems with interpretation. The adjudicators must determine if a risk exists and analyse the degree of risk caused by the product[46]. This risk has to have a direct relation to the measures taken, to do this, the Appellate Bodies have examined, the design and structure of the measure and it has become apparent that the measures undertaken to achieve this objective are broad. In Japan-Alcoholic Beverages II the Appellate Body stated: " the aim of a

measure may not be easily ascertained, nevertheless, its protective application can most often be discerned from the design, the architecture and the revealing structure of a measure”[47]

In *Brazil-Retreaded Tyres (2007)* , Brazil submitted a claim that the accumulation of waste tyres creates a perfect breeding ground for disease carrying mosquitoes which posed a substantial risk through the transmitting of diseases such as dengue and yellow fever. The accumulation of waste tyres also created the risk of tyre fires and toxic leaching. Brazil argued also argued that the risk posed to animals was high due to mosquito-borne diseases and numerous toxic chemicals and heavy metals contained in the pyrolytic oil released from tyre flames.[48]

The panel accepted Brazil’s argument and concluded that, Brazil’s Policy of reducing exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres falls within the range of policies covered by Article XX (b).[49]

The correlation between a measure and a policy can be adduced from the analysis of the objective. Measures that have no subjective relations are often required to fulfil the policy objective on health policies. The scope is broad and can easily invite protective measures under the guise or Article XX (b).

Secondly For a measure to fall under the ambit of Article XX (b), has to meet the necessity requirement and meet the requirements of the chapeau.[50]In addition the description of the ‘ necessity requirement with respect to the chapeau.[51]However in order understand the necessity requirement within

the meaning of Article XX(b) the Appellate body in Brazil-Retreaded[52]tyres stated that, a panel must consider the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective and it's trade restrictiveness. In this balancing approach, a balance of probabilities taking into account all relevant factors assists the adjudicator reach an appropriate decision.

However other texts argue that this is not a balancing or proportionality test, rather it is a reasonable test, whether a reasonable regulator could have adopted the measure it did[53]. This approach is narrow and takes on a defensive approach, I do not agree with this view as it limits the rights of a member to achieve a policy objective. In this situation protection of national interests specifically relating to health policies.

The more vital or important the common interests or values pursued, the easier it would be to acc