ISSN 1794-5216

THE LEGITIMATE REGULATORY DISTINCTION IN THE TBT AGREEMENT: EVOLUTION, CRITICISM AND PERSPECTIVES

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Fecha de recepción: 8 de abril de 2014
Fecha de aceptación: 26 de septiembre de 2014

ABSTRACT

In an effort to strike a balance between a Member's right to self-regulate and the common objective of trade liberalization, three recent cases in the World Trade Organization analyzed and interpreted the non-discrimination principle contained in Art. 2.1 of the TBT Agreement and concluded that not every less favourable treatment constitutes a discriminatory treatment. This article analyzes the concept of Legitimate Regulatory Distinction, introduced by WTO Case Law in the analysis of Art. 2.1 of the TBT, by examining its link with the principle of non-discrimination, its relation with other WTO provisions and its problems and outlooks.

Key words: Legitimate Regulatory Distinction; Non-Discrimination Principle; National Treatment; TBT Agreement; WTO Case Law.

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RESUMEN

En un esfuerzo por balancear el derecho de sus Miembros a autorregularse y el objetivo común de la liberalización del comercio, tres recientes casos en la Organización Mundial del Comercio, OMC, analizaron e interpretaron el principio de la no discriminación contenido en el artículo 2.1 del Acuerdo sobre Obstáculos Técnicos al Comercio, TBT, y estableciendo que no cualquier trato menos favorable implica una discriminación per se. Este trabajo analiza el concepto de Distinción Reglamentaria Legítima, introducido por la jurisprudencia reciente del Órgano de Apelación al análisis del citado artículo, examinando su nexo con el principio de la no discriminación en la OMC, su relación con otras disposiciones de la OMC y sus problemas y posibles perspectivas.

Palabras clave: *distinción reglamentaria legítima; trato nacional; principio de la no discriminación; acuerdo sobre obstáculos técnicos al comercio; jurisprudencia del órgano de apelación de la OMC.*

1. INTRODUCTION

1.1. The non-discrimination principle: history and nature.

The WTO agreements encompass a wide catalogue of obligations related to matters such as agriculture, government purchases, standards and product safety, sanitary and phytosanitary regulations, among others. Even though each of these agreements deals with the regulation of a specific subject area, there are several basic principles that permeate and constitute the basis for all the multilateral trading system. Some examples of these foundational principles are market access, predictability, transparency, free trade, fair competition and non-discrimination. The present article will focus on a specific manifestation of the latter.

The preamble of the WTO Agreement highlights the importance of this principle by establishing that the "elimination of discriminatory treatment in

international trade relations" is one of the main means by which the objectives of the WTO are achieved.

It is important to recall the history of this organization in order to understand the extent and significance of this principle. It is not a secret that discrimination between nations has been, throughout history, a typical characteristic present in the different protectionist trade policies adopted by states. As such, the GATT 1947 arose from the ashes of World War II, just as the Cold War and other conflicts led to the transformation and further emergence of the WTO in 1994. As Van den Bossche states, "discrimination in trade matters breeds resentment among the countries, manufacturers, traders and workers discriminated against. Such resentment poisons international relations and may lead to economic and political confrontation and conflict".[1]

That being said, the enshrinement of this multilateral trading system based on such principles, reflects the spirit of cooperation held by the international community at the time to leave behind struggles of the past.

1.2. The Most Favored Nation and National Treatment obligations in WTO law

The non-discrimination principle is materialized through the National Treatment, NT, and Most Favoured Nation, MFN, obligations, which are present in several key provisions of the different agreements; for instance, arts. I and III of the GATT, arts. II and XVII of the GATS and arts. 2.1, 2.2 and 5.1.1 of the TBT.

As per the MFN obligation, members are compelled to avoid discrimination between their trading partners, meaning "any member of the WTO that gives a favorable treatment to another partner is under the obligation to grant the same treatment to all Members of the WTO".[2]

Additionally, not only the preamble of the Mariakech Agreement refers to this obligation as one of the "basic principles" but also the jurisprudence of the Appellate Body has recognized the essential role that this obligation has, as one of the pillars of the WTO system. In the *US-Section 211 Appropriations* report,

1 Peter Van den Bossche. *The Law and Policy of the World Trade Organization.* Cambridge University Press (2005). P. 369.

2 Simon Lester and others, *World Trade Law: Text, Materials and Commentary*. Hart Publishing (2008). P. 322.

it was established that it "has been both central and essential to assuring the success of a global rules-based system for trade in goods".[3]

On the other hand, the NT obligation's main objective is to prevent discrimination between imported and domestic products or services[4] of the members. It has been defined as "central to the market access principle of the WTO",[5] and its importance has been highlighted in various reports such as the *Korea-Alcoholic Beverages* dispute, where the Appellate Body identified as its main purpose "avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships".[6] Hence, discrimination between like imported and domestic products or services is prohibited, to prevent members from hiding protectionist measures under an internal regulation.

As such, there is no doubt that the MFN and NT obligations permeate the WTO system as the materialization of the non-discrimination principle. They both share a common objective, which is to "prohibit discrimination on the basis of 'nationality' or the 'national origin or destination' of a product, service or service supplier".[7]

Nevertheless, these principles are not absolute and whether it is under the MFN or the NT obligation, there are exceptions and nuances that make their application more flexible. It is important to consider that in some cases, this responds to legal reasons while in others to political issues, justifying then contravention of an obligation. Therefore, the different exceptions contained in WTO law have been designed to reconcile free trade with these relevant values and interests of its members. According to Van den Bossche, "these exceptions are important in WTO law and policy because they allow for the 'reconciliation' of trade liberalization with other economic and non-economic values and interests".[8] Some examples of these interests that need to be reconciled and

3 *Ibid*.

4 Article X VII of the GATS makes reference to the National Treatment Obligation. It is important t consider that under this agreement, the applicability of the NT obligation depends specifically on the commitments assumed by the Members on each of the different sectors.

5 Mistuso Matsushita and others*, The World Trade Organization: Law, Practice, and Policy.* 2nd edition, Oxford: OUP (2006). P. 227.

6 WTO Appellate Body, *Korea-Alcoholic Beverages*, para. 120 (June 4th, 1999).

7 *Ibid*., P. 370.

8 Peter Van den Bossche. *The Law and Policy of the World Trade Organization.* Cambridge University Press (2005). P. 322.

protected are public health, consumer safety, environmental issues, economic development and national security, among others.

Doctrine has classified these rules in six main categories, as follows: i) the general exceptions of Art. XX of the GATT and Art. XIV of the GATS, ii) the 'security exceptions' of Art. XXI of the GATT and Art. XIV of the GATS, iii) the 'economic emergency exceptions' of Art. XIX of the GATT and the Agreement on Safeguards, iv) the 'regional integration exceptions' of Art. XXIV of the GATT and Art. V of the GATS v) the 'balance of payments exceptions' of Arts. XII and XVIII: B of the GATT 1994 and Art. XII of the GATS, and vi) the 'economic development exceptions'.[9]

Panels and the Appellate Body continue to interpret the Covered Agreements and the role that the general rule and the exceptions must play within the international trade. That is why in 2012, when analyzing Art. 2 of the TBT, a new exception –that falls within the first category, which refers to the 'general exceptions'- was added to the system; thus, reducing even more the alleged general rule of the non-discrimination principle. This development will be explained hereafter.

2. A NEW EXCEPTION WAS INTRODUCED TO THE WTO LAW: ANALYSIS OF ART. 2.1 OF THE TBT

Following the general goals of the WTO, the TBT aims to ensure Members are able to adopt measures to fulfill their legitimate objectives pursued. In doing so, the TBT allows the Members states to create measures regulating the product characteristics or the related processes and production methods of the products that enter their territory, in either a mandatory (technical regulations) or non-mandatory (standards) fashion. It also envisages the possibility of developing conformity assessment procedures, aimed for the verification of the fulfillment of the requirements set in the technical regulations and standards.[10] This, provided that they do not create unnecessary obstacles to trade or are applied in a manner that constitutes "means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade", as expressed in the sixth recital of its preamble.

In the GATT, the balance between these objectives of trade liberalization and the Members' rights of self-regulation is achieved primarily by weighing

9 *Ibid*., P. 590.

10 Annex 1 TBT Agreement.

the MFN and NT obligations with the exceptions of Art. XX. However, panels facing the same issue under the TBT are confronted by an additional challenge and that is the fact that under this agreement no provision expressly counter-balances the NT and MFN obligations contained in Art. 2.1.

In 2012, the Appellate Body issued three separate reports concerning the examination and interpretation of the TBT and specifically of Art. 2.1: *US-Clove Cigarettes* (circulated April 4th), *US-Tuna II* (circulated May 16), and *US-COOL* (circulated June 29). Each of these cases contributed to the understanding and limitation of the NT obligation by introducing and interpreting the concept of 'legitimate regulatory distinction' as a necessary step in the determination of a violation under Art. 2.1. For the proper understanding of this concept, it is necessary to examine the line of case law that was created in 2012, from the initial approach reached in the *US-Clove Cigarettes* dispute, to the interpretation done by the Appellate Body in the *US-COOL* dispute.

2.1. US-Clove Cigarettes:

The *US-Clove Cigarettes* dispute arose after the United States implemented Section 907(a)(1)(A), a regulation which banned any cigarettes containing artificial flavors other than tobacco and menthol, for the purpose of reducing youth smoking. Indonesia, a major producer of clove cigarettes requested dispute settlement consultations and afterwards, a Panel was established on July 20th, 2010.

Indonesia claimed that the ban violated several provisions of the TBT, including Arts. 2.1 and 2.2. The complainant party argued that the measure accorded a less favourable treatment to the imported clove cigarettes than the one accorded to the like domestic menthol cigarettes and that it was more restrictive than necessary to fulfill a legitimate objective.

In its report, the Panel found an inconsistency between the technical regulation and Art. 2.1 due to the fact that the more favourable treatment accorded to the domestic menthol products was not conceived for the purpose of achieving the legitimate objective pursued, but rather to avoid incurring in the costs that would be created with the ban of menthol cigarettes as well. After determining that this measure accorded a less favourable treatment between like products, the Panel found that the United States was in breach of its obligations under Art. 2.1 of the TBT.[11]

11 WTO panel report, *US-Clove Cigarettes*. para. 7.293 (September 2nd, 2011).

The Appellate Body, in its assessment of the claim under Art. 2.1, determined that it is the very nature of a technical regulation to create distinctions among products based on their characteristics or their related processes and production methods and as such, the sole recognition of a differential treatment does not prove a violation under this article.[12] In fact, the Appellate Body went on to determine that a reading of this article together with Art. 2.2 and the sixth recital of the preamble of the TBT, gave sufficient context to conclude that obstacles on international trade are permitted as long as they serve the purpose of achieving a legitimate objective and are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[13]

In this case, the Appellate Body criticized the brevity of the Panel's analysis but upheld its decision, albeit for different reasons. It determined that the treatment in the case at hand was in fact discriminatory against the imported clove cigarettes and that this differential treatment did not stem exclusively from a legitimate regulatory distinction. The United States determined the necessity of banning clove cigarettes due to its characterizing flavor, a characteristic that was shared by the menthol cigarettes, that were mostly produced domestically, amounted to an important share of the country's cigarette consumption and were exempted from this ban.

In this case not only did the Appellate Body introduce the concept of legitimate regulatory distinction but it analyzed its meaning by finding that the measure was inconsistent with Art. 2.1 of the TBT. The differential treatment did not stem exclusively from a legitimate regulatory distinction as there was no relation whatsoever between the legitimate objective pursued and the exemption of menthol cigarettes.[14] Following the sixth recital of the preamble of the TBT, the Appellate Body found that the measure constituted an unjustified discrimination against the group of imported products as it was not applied in an even-handed manner[15] and, for that reason, it was inconsistent with the NT obligation contained within Art. 2.1 of the TBT.

12 WTO Appellate Body, *US-Clove Cigarettes*. para. 169 (April 4th, 2012).

13 *Ibid*., para. 173.

14 *Ibid*., para. 226.

15 *Ibid*.

2.2. US-Tuna II:

The second case of this "trilogy" is the *US-Tuna II* dispute. In this case, Mexico petitioned the establishment of a panel, requesting it to find that the Dolphin Protection Consumer Information Act (DPCIA) was inconsistent with several GATT and TBT provisions, including Arts. III: 4 and I:1 of the GATT and 2.1 of the TBT. This measure, aimed to regulate the eligibility of tuna products for the "dolphin-safe" label, established four different criteria that classified tuna in five different groups. This, according to Mexico, effectively excluded Mexican tuna products from the label, given the fact that most of its tuna was fished within the Eastern Tropical Pacific by setting on dolphins.

The Panel however found no violation of the NT obligation contained in Art. 2.1., as the measure did not discriminate against the Mexican tuna products. The measure in itself was origin-neutral and in fact, allowed Mexican tuna products to use the dolphin-safe label if they complied with certain requirements. The detrimental impact, concluded the Panel, "felt by Mexican tuna products on the US market is, in our view, primarily the result of "factors or circumstances unrelated to the foreign origin of the product", including the choices made by Mexico's own fishing fleet and canners".[16]

The Appellate Body in this dispute reaffirmed several of the arguments exposed in the *US-Clove Cigarettes* case, regarding the legitimate regulatory distinction. It reinforced the concept that a less favourable treatment is one that changes the conditions of competition in the relevant market in detriment of the imported products. Also, it concluded that it is the burden of the complaining party to demonstrate that the measure has not been applied in an even-handed manner and only then, does the burden of proof shift towards the responding party, which has to demonstrate that the less favourable treatment stems exclusively from a legitimate regulatory distinction.[17]

In the case at issue, the Appellate Body reversed the Panel's findings regarding Art. 2.1 of the TBT, after determining that Mexico had met its burden of demonstrating that the labeling requirements set by the measure did not address in an even-handed manner the risks to dolphins associated to other fishing techniques and in other areas than the ETP.[18] The Appellate Body reversed the decision after finding that the United Stated had failed to rebut Mexico's prima

16 WTO panel report, *US-Tuna II*, para. 7.378 (September 15, 2011).

17 WTO Appellate Body, *US-Tuna II*, para. 216 (May 16, 2012).

18 *Ibid*., para. 297-298.

facie case, as it did not demonstrate that the less favourable treatment stemmed exclusively from a legitimate regulatory distinction.

In this case the approach to the legitimate regulatory distinction from the perspective of the even-handedness of the measure is much clearer. The measure pursued the protection of dolphins from certain techniques of fishing and in certain areas, but failed to address other fishing practices and other areas that were just as relevant. The US breached its obligations under Art. 2.1 as it discriminated against Mexico's products by imposing requirements that were not imposed to the United States and other countries and because it failed to demonstrate that there was a justification for such discrimination.

2.3. US-COOL

The third and final case was the *US-COOL* dispute. The case was brought to the WTO after the US implemented a measure that imposed on the retailers of several meat products, the obligation of including a label that specified the country of origin of the products. The measure created a labeling scheme that specified where the animals had been born, raised and processed, by implementing 4 different categories depending on the involvement of different countries in the meat production process.

The Panel found that the COOL measure accorded a less favourable treatment to the products of Canada and Mexico than the one accorded to the US products. It considered that the higher compliance costs for the foreign products created an incentive in favour of processing exclusively domestic livestock, in detriment of the Mexican and Canadian products. Thus, the Panel found the measure to be inconsistent with Art. 2.1 of the TBT agreement, as it *de facto* discriminated against these countries' products by modifying their conditions of competition in the relevant market.

The Appellate Body agreed with the Panel regarding its assessment of a less favourable treatment but went on to determine whether this distinction was discriminatory or stemmed exclusively form a legitimate regulatory distinction. In doing so, it upheld the Panel's decision but for different reasons. It found that the least costly way of complying with the COOL measure was to rely exclusively on domestic livestock, creating a competitive disadvantage against foreign livestock. It went on to underline the fact that this differential treatment was not justifiable as there was a gap between the recordkeeping and

verification requirements, and the information that was ultimately conveyed to the consumer.[19]

The Appellate Body's ultimate finding regarding this issue was that the measure did not stem exclusively from a legitimate regulatory distinction because the burdens imposed on upstream producers and processors, that incentivized the use of domestic livestock only, did not contribute properly to the legitimate objective. For that, the Appellate Body concluded that "the regulatory distinctions imposed by the COOL measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that they cannot be said to be applied in an even-handed manner".[20] This characterization of the legitimate regulatory distinction seems to be more related with Art. 2.2 of the TBT, which requires that a country's technical regulation is not more trade-restrictive than necessary for the fulfillment of the legitimate objective, but ultimately reflects the Appellate Body's intention of preventing discrimination against foreign products without a legitimate justification.

So far, the analysis of the legitimate regulatory distinction has been outlined on a case-by-case basis. Under Art. IX: 2 of the Marrakesh Agreement it is the exclusive power of the Ministerial Conference and the General Council to give a proper definition and to interpret the terms and elements that have characterized and limited the application of this 'exception'.[21] Some of these elements have not been properly defined within the WTO and its application will have to be limited in the future by the Member States along with the adjudicating bodies of the WTO. However, "arbitrary" and "unjustified", two of the concepts that will have a decisive role in future TBT-related disputes, have already been analyzed in WTO case law, particularly, in cases involving the *chapeau* of GATT Art. XX. In order to determine if the same interpretation adopted in previous reports can be applied, it is necessary to first examine the content of this article and the interpretation given to it and to these two concepts within the GATT context.

3. MEANING AND EXTENT OF "ARBITRARY" AND "UNJUSTIFIED" CONTAINED IN THE CHAPEAU OF GATT ART. XX

As mentioned before, GATT Art. XX is the 'general exception' for the non-discrimination principle that should be present in measures regulating the trade

19 WTO Appellate Body, *US-COOL*, para. 349 (June 29, 2012).

20 *Ibid*.

21 *Ibid*.

of goods between WTO Members. This means that this disposition, which has the nature of an affirmative defense[22], allows a defendant party to justify a breach of its obligations under the GATT, by demonstrating that the inconsistent measure (i) is provisionally justified under one of the subparagraphs of Art. XX; and (ii) is consistent with its *chapeau*, which implies an analysis of whether a given measure is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".[23] It is precisely under this second part of the two-tier test where the words "arbitrary" and "unjustified" have a fundamental role, since they help adjudicating bodies determine if a measure is justified or not under this article.

However, this analysis has been ambiguous. Neither case law, nor doctrine, have been able to clearly define the criteria of interpretation that must be used to analyze each of the elements contained in the *chapeau* and their extent[24]. Such ambiguity makes it difficult for Members to properly justify their measures using past panel and Appellate Body reports.

As a consequence of this difficult panorama, not even by recalling the *chapeau*'s purpose and scope, is it possible to fully comprehend the meaning and extent of the terms "arbitrary" and "unjustifiable", according to the case law that develop this matter. This will be explained below.

3.1. Meaning and extend of the terms "arbitrary" and "unjustifiable" in the light of the purpose of the *chapeau*

For an interpreter to understand the meaning of the analyzed terms under the scope of the *chapeau* of GATT Art. XX, he must first understand its purpose. The Appellate Body has established that the *chapeau* aims to prevent the abuse in the use of the exceptions contained in the subparagraphs of Art. XX[25] by balancing the right of a Member to invoke an exception under Art. XX, and the rights of the other Members under other GATT provisions.[26]

22 WTO panel report, *US-Gambling,* para. 6.450.

23 WTO Appellate Body, *US-Gasoline,* p.22 (April 29, 1996).

24 Lorand Barthels. *A new interpretation of the Chapeau.* Legal Studies Research Paper Series, University of Cambridge Faculty of Law. July, 2014. Paper No. 40/2014. P.6.

25 *Ibid*.

26 WTO Appellate Body, *US- Shrimp,* para. 159 (October 12, 1998).

This approach was developed in the *US-Shrimp* dispute, where the United States used the exception under subparagraph (g) to justify any inconsistency of the US Section of Public Law 609 and its associated regulations and judicial rulings, with the GATT. Thus, it submitted that the certification of shrimp import created with this regime, sought for the protection and preservation of sea turtles as exhaustible natural resources. When analyzing if the measure was compliant with the *chapeau,* the Appellate Body referred to the good faith principle, stating that "the *chapeau* of Art. XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states".[27] Concluding, it can be determined that the purpose of the *chapeau* is to prevent defendant parties to abuse from the general exceptions provision.

3.2. How to identify that the manner in which a measure is applied, and its ideal applicability, do not constitute an "arbitrary" or "unjustified" discrimination

Having explained that the *chapeau* of GATT Art. XX is an expression of the good faith principle, it is now necessary to describe which aspects of the measure are addressed by it. According to Lorand Bartels, the traditional interpretation of Art. XX states that the analysis of justification of a measure must take into account the "difference between a 'measure' (to be appraised under the subparagraphs of Art. XX) and its 'application' (to be appraised under the *chapeau*)". [28] Hence, for a measure to comply with the *chapeau* it must be applied in a manner that: (i) is not arbitrary or unjustified; and/or (ii) does not constitute a disguised restriction to trade.

The first time that this traditional view was applied by the Appellate Body, was in the *US-Gasoline* dispute, where it had to be determined if the measure at issue was consistent with the *chapeau*, since the United States asserted that any contravention of the GATT should be found to be justified under the Art. XX (g) exception. The Appellate Body first defined the extension of the analysis that must be made under the Chapeau, in the terms that follow:

> The chapeau, by its expressed terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. (…). The chapeau is animated by the principle

27 *Ibid*., para. 158.

28 Lorand Barthels. *A new interpretation of the Chapeau.* Legal Studies Research Paper Series, University of Cambridge Faculty of Law. July, 2014. Paper No. 40/2014. P. 4.

> that while the exceptions of Art. XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the general agreement.[29]

This same approach was applied by the Appellate Body in the *US-Shrimp*[30] and the *Brazil-Retreaded Tyres* disputes[31], in order to determine if the manner in which the import bans at issue were consistent with the *chapeau* of Art. XX.

Nevertheless, the recent Appellate Body report of the *EC-Seal Products* dispute, suggested a different view of how to address the chapeau. In that sense, it stated that:

> Whether a measure is applied in a particular manner 'can most often be discerned from the design, the architecture, and the revealing structure of a measure' [citing the *Japan-Alcoholic Beverages II* dispute]. It is thus relevant to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[32]

This new view is more rigid than the traditional one, as it demands a defendant party, to demonstrate that the manner in which the measure is applied is consistent with the *chapeau*, but also that its design and structure are coherent with it, both in its actual and expected application.

3.3. Meaning and extent of the terms "arbitrary" and "unjustified" in the context of the *chapeau*:

According to Bartels, the case law about the justification of a measure under the second part of the *chapeau* of Art. XX is "associated with the idea that the chapeau is about procedure, not substance".[33] Hence, unjustified and arbitrary discrimination relates with the decision-making process of the defendant party of a given measure.

29 *Ibid.,* P.22.

30 WTO Appellate Body, *US-Shrimp,* para. 115 (October 12, 1998).

31 WTO Appellate Body, *Brazil-Retreaded Tyres,* para. 215 (December 3rd, 2007).

32 WTO Appellate Body, *EC-Seal Products,* para. 5.302 (May 22, 2014).

33 Lorand Barthels. *A new interpretation of the Chapeau.* Legal Studies Research Paper Series, University of Cambridge Faculty of Law. July, 2014. Paper No. 40/2014. P.17.

However, the analysis has never started from defining either term. Thus, all eight reports in which an adjudicating body has analyzed the consistency of the measure at issue with the *chapeau*[34], have shed some light on whether a measure, either by its design or by its effects, constitutes an arbitrary or unjustified discrimination between countries where the same conditions prevail.

In the *US-Shrimp* dispute, the Appellate Body concluded that the way in which the US Section 609 was applied constituted an arbitrary discrimination, since it was unacceptable for a WTO Member to use an economic embargo to require other Members to adopt essentially the same regulatory program without taking into consideration the different conditions of the other Member states, due to the rigidness and inflexibility of the certification requirement. Additionally, there was lack of transparency and procedural fairness in the process of certification.

Moreover, in the *Brazil-Retreated Tyres* dispute, the Appellate Body added that the consistency of a measure with the *chapeau* of Art. XX must be seen by the contribution of the measure to the objective pursued, as they must bear a rational connection.[35] With this in mind, the Appellate Body concluded that the exemption to the measure at issue "resulted applied in a manner that constituted arbitrary or unjustifiable discrimination.[36] It reached that conclusion, as the exemption had no relation with the object pursued by Brazil, which was to protect the population from diseases and to protect the environment from the contamination caused by retreated tyres.

Finally, in the *EC-Seal Products* dispute, the Appellate Body concluded that, even when the EC seal regime was provisionally justified under subparagraph (a) of Art. XX, it was designed and applied in a manner that constituted a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[37] It held this conclusion by finding (i) that the exemption to the general ban on the import of seal given to indigenous hunt, had no close relation to the main purpose pursued by the measure, which was to protect animal welfare, as a public moral concern;[38] and (ii) that the European union

34 i.e., *US-Gasoline, US-Shrimp, EC-Asbestos, Argentina-Hides and Leather, Brazil-Retreaded Tyres* and *EC-Seal Products*.

35 WTO Appellate Body, *Brazil - Retreated Tyres,* para. 227 (December 3rd, 2007).

36 *Ibid,* para. 228.

37 WTO Appellate Body, *EC-Seal Products,* para. 5.38 (May 22, 2014).

38 *Ibid*.

had not made significant efforts to facilitate the access of the Canadian Inuit to the aforementioned exemption.

In the abovementioned terms, the Appellate Body has outlined the manner in which the concepts "arbitrary" and "unjustified" should be interpreted within the GATT context. However, it is clear that this approach is far from definitive. Nevertheless, it is evident that GATT case law is more robust in this matter than TBT jurisprudence. Therefore, the question of whether recourse may be had to the former in order to interpret the concepts of "arbitrary" and "unjustified" in the latter must be addressed; and, if so, the consequences that would result from this application must be studied.

4. THE NEW PANORAMA OF ART. 2.1: CRITIQUES AND PERSPECTIVES

As explained above, the Appellate Body introduced the concepts of "arbitrary" and "unjustifiable" to determine whether a measure is designed or applied in an even-handed manner. Nevertheless, several concerns arise from this interpretation, especially with respect to the relationship of Art. 2.1 of the TBT with Art. XX of the GATT and Art. 2.2 of the TBT. This concerns will be described hereafter:

4.1. What is the role that Art. XX of the GATT will have in the interpretation of Art. 2.1 of the TBT?

As it was exposed previously, GATT Art. XX contains in its *chapeau*, the words "arbitrary and unjustifiable". Therefore, it is necessary to examine which should be the attitude of the interpreter towards the analysis previously performed in disputes related to the *chapeau* when addressing the same two concepts within the context of Art. 2.1.

In order to determine the influence that the discussions of Art. XX will have on the disputes related to Art. 2.1, two considerations must be made: first, it must be analyzed if recourse may be had to the interpretation given to Art. XX, taking into account that Art. 2.1 does not envisage this possibility; and second, it must be examined if the issues that the interpretation of the *chapeau* has raised will be present as well in the analysis of Art. 2.1.

4.1.1. Is it possible to resort to Art. XX in disputes related to Art. 2.1?

TBT-related case law has introduced the concepts "arbitrary" and "unjustified" for the assessment of a violation under Art. 2.1 as it has been already exposed.

Although these two concepts were abstracted from the preamble of the TBT, they are as well present in the *chapeau* of Art. XX of the GATT, which has been widely examined by the Appellate Body. However, the relation between both provisions is unclear given that none of the three landmark disputes that set the course of interpretation of Art. 2.1 contain a profound analysis of Art. XX.

The reason why the relation between them must be determined is based on Art. II: 2 of the WTO Agreement, which states that Annexes 1 (which includes the GATT and the TBT), 2 and 3 are integral parts of this Agreement[39]; thus, they must be interpreted in a harmonious manner. Therefore, it would not be admissible to read the concepts "arbitrary and unjustifiable" introduced to the analysis of Art. 2.1 in an isolated manner with respect to those same words present in the *chapeau* of Art. XX.

However, finding such relation is difficult since Art. 2.1 does not make an explicit reference to the GATT. This is why Henry Hailong Jia proposes to interpret the article in light of its object and purpose, as conceived in Art. 31 of the Vienna Convention on the Law of Treaties.[40] While performing this interpretation in Art. 2.1, it is clear that the TBT has various aims, many of which can be found in its preamble. One of them is the desire to further promote the objectives of the GATT (recital No. 2 of the preamble), objective that is reinforced by recitals No. 5 and 6. Therefore, as it is concluded by this author, the identity of their objectives may permit the extension of the interpretation of certain GATT dispositions to the TBT articles, such as the conclusions regarding the *chapeau* of Art. XX to Art. 2.1.

Taking into consideration the aforementioned conclusion, and in light of the similarities between GATT provisions and the preamble of the TBT it seems plausible that the Appellate Body may resort to its previous considerations regarding the terms "arbitrary" and "unjustifiable" under GATT Art. XX in order to interpret the meaning of those words under the TBT.

4.1.2. Several problems regarding the interpretation of the chapeau of Art. XX may appear as well in the analysis of Art. 2.1.

The fact that the Appellate Body may analyze the words "arbitrary" and "unjustifiable" in TBT disputes in a similar manner as it did in GATT cases is

39 Illustrated by the Appellate Body in *Brazil – Desiccated Coconuts*, p. 12 (February 27th, 1997).

40 Henry Hailong Jia. *Entangled Relationship between Art. 2.1 of the TBT Agreement and Certain Other WTO Provisions*. Chinese Journal of International Law. December, 2013. At. 723.

more problematic than helpful, since (i) the jurisprudence has never defined those two concepts, and (ii) only in one case has a State been able to successfully justify its measure under the *chapeau* of Art. XX and it was due to the lack of evidence brought forward by the opposing party to refute such claim. These issues will be explained hereafter:

4.1.2.1. No definition of the concepts "arbitrary" and "unjustifiable" can be found in previous WTO case law

As it was exposed before, there is no uniformity in the manner how the *chapeau* of Art. XX of the GATT is read since the words "arbitrary" and "unjustifiable" have never been defined. The Appellate Body, in the *Brazil-Retreaded Tyres* dispute, concluded that a measure is arbitrary and unjustified whenever the reason behind the alleged discrimination contradicts the purpose of the measure.[41] But, beyond that, no concrete notion of the two terms has been given; thus, it is studied on a case-by-case basis.

In the aforementioned case, as well as in the *US-Shrimp* dispute, the Appellate Body focused the analysis of the *chapeau* on whether the alleged discrimination present in the measure was justifiable. This approach was different from the one performed on the decision on *US-Gasoline*, where the Appellate Body focused its understanding of the *chapeau* on the necessity and the proportionality of the measure adopted, rather than on its justification. This is possible in GATT disputes because the *chapeau* has vague boundaries; hence, the Adjudicating Body is able to adapt the understanding of the two concepts depending on the case.

The ambiguity of these concepts will, without doubt, create a scenario of uncertainty in TBT-related disputes. They were introduced for analyzing Art. 2.1, a disposition that has well-set limits around the examination of whether a legitimate regulatory distinction exists to justify the discrimination, but that should not have any relationship with the necessity and proportionality of the measure –aspect covered by Art. 2.2 of the TBT. But even though Art. 2.1 has been analyzed in few occasions, confusion may be already found in the *US-COOL* case, where an overlap between Arts. 2.1 and 2.2 seems to arise from the inclusion of the words "arbitrary" and "unjustified" in the analysis of Art. 2.1. This confusion will be addressed in detail below.

In conclusion, the Appellate Body, when extending the interpretation of the *chapeau* to the analysis of Art. 2.1, introduced yet another confusing issue to

41 WTO Appellate Body, *Brazil-Retreaded Tyres*, para. 226 (December 3rd, 2007).

an agreement that is yet in the process of settlement. Therefore, the interpreter should not be allowed to shape the two concepts in such an ambiguous manner –as it already did in the mentioned *US-COOL* dispute- in order to preserve the spirit of Art. 2.1.

4.1.2.2. One single precedent of a successful claim of justification under the chapeau of Art. XX GATT

Linked to the lack of a unified interpretation of the *chapeau* of Art. XX is the fact that only one country has been able to invoke Art. XX as an affirmative defense and obtain a positive ruling from the Appellate Body out of the forty-three cases in which this defense has been raised. This means that, as concluded in a study conducted by Public Citizen –a non-profit advocacy organization-, the success rate when invoking Art. XX is of 3 %.[42]

The tendency in future disputes regarding Art. 2.1 will probably be similar. In the three cases where Art. 2.1 has been discussed, the United States, as a respondent, was not able to rebut the alleged violations of this article. For the United States, the fact that this article had never been interpreted posed a difficulty in order to justify that its measure stemmed exclusively from a legitimate regulatory distinction. But now that the Appellate Body established the parameters for the respondents, it seems even more difficult for any respondent party to dismiss a claim under Art. 2.1.

In conclusion, by imposing the burden for respondents to prove that their measures are neither arbitrary nor unjustifiable, the Appellate Body set an even higher bar for them to dismiss claims alleging a contravention of Art. 2.1. This is another example of how the conclusions of the Appellate Body regarding this article are making it unreasonably stringent.

42 *Only one of 44 attempts to use the GATT Art. XX/GATS Art. XIV "general exception" has ever succeeded: replicating the WTO exception construct will not provide for an effective TTP general exception.* Public Citizen. August, 2015. From the forty-three cases, the defense was discarded in eleven of them for they were found to be irrelevant. Of the remaining thirty-two, only nine succeeded in the first step of the two-tier test to justify the measure under this article –that is, justifying the measure under one of the subparagraphs of the article and in the analysis of the *chapeau* –which is the second step of the test-, eight of the respondents failed to demonstrate that their measure was neither arbitrary nor unjustifiable or that it did not constitute a disguised restriction to trade.

4.2. Is Art. 2.2 being reduced to inutility?

Arts. 2.1 and 2.2 of the TBT have different purposes: while Art. 2.1 refer to the justification of the discrimination, based on the existence of a legitimate regulatory distinction, Art. 2.2 analyze the necessity and proportionality of the measure at issue.

As it was previously explained, the words "arbitrary" and "unjustified" have been interpreted within the context of Art. XX to refer to both the justification of discrimination and the necessity of the measure due to the vague limits of this disposition. Therefore, it has elements in common with both Arts. 2.1 and 2.2. Nevertheless, those two concepts were only extended to the analysis of Art. 2.1; hence, the logical approach to the examination under this provision should exclude any reference to the necessity or proportionality of the measure (in order to avoid a clash between Arts. 2.1 and 2.2).

This approach was followed in *US-Clove Cigarettes* and in *US-Tuna II*, where the Appellate Body concluded that the United States was in violation of Art. 2.1 since the origin-based discrimination present in the measures under study did not stem exclusively from a legitimate regulatory distinction. However, a turning point was found in the *US-COOL* dispute, where the Appellate Body ruled that the United States was in breach of its obligations under Art. 2.1 since the measure at issue was disproportionate with respect to its objective; thus, arbitrary and unjustified. This means that the necessity and proportionality analysis, typical of Art. 2.2 and unrelated to Art. 2.1, was introduced to the examination of the latter.

This decision, which is the most recent regarding Art. 2.1, creates doubts about the way how Arts. 2.1 and 2.2 should be studied in the future. If, in the disputes to come, the Appellate Body continues with this approach, the elements of Art. 2.2 are in risk of becoming a part of the analysis of Art. 2.1. Such an interpretation, besides from absurd, would pose the risk of reducing Art. 2.2, and its necessity test, to inutility, which would contravene the effective treaty interpretation principle.

5. CONCLUSIONS

Due to the lack of analysis of Art. 2.1 of the TBT before 2012, it was evident that the Appellate Body had an enormous responsibility when laying down the parameters of interpretation of this provision. Nevertheless, the way how the Adjudicating Body performed its analysis leaves future interpreters of

this agreement with a serious task of specifying what is the extension that the 'legitimate regulatory distinction', as an exception to the non-discrimination principle, should have within the WTO law.

In doing so, the interpreters will have to define as well the manner how Art. 2.1 sin a proper and autonomous fashion without becoming a part or reducing to inutility provisions such as Arts. 2.1 of the TBT and XX of the GATT. This creates an interesting role for publicists, counselors, Member States, panelists and members from the Appellate Body: to provide the WTO legal system with a proper and adequate exception within the regulation of the technical barriers to trade.

BIBLIOGRAPHY:

Alexander Achia. *Exceptions to and the Fate of the Most Favoured Nation Treatment Obligation under the GATT and GATS.* MPRA Paper No. 41237 (2012).

Henry Hailong Jia. *Entangled Relationship between Art. 2.1 of the TBT Agreement and Certain Other WTO Provisions.* Chinese Journal of International Law. December, 2013. At. 725.

Lorand Barthels. *A new interpretation of the Chapeau.* Legal Studies Research Paper Series, University of Cambridge Faculty of Law. July, 2014. Paper No. 40/2014

Mistuso Matsushita and others*, The World Trade Organization: Law, Practice, and Policy.* 2nd edition, Oxford: OUP (2006).

Peter Van den Bossche. *The Law and Policy of the World Trade Organization.* Cambridge University Press (2005).

Peter Van den Bossche. *The Law and Policy of the World Trade Organization.* Cambridge University Press (2005).

Simon Lester and others, *World Trade Law: Text, Materials and Commentary*. Hart Publishing (2008).

WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994.

WTO Appellate Body, *Brazil-Retreaded Tyres* (December 3rd, 2007).

WTO Appellate Body, *Korea- Alcoholic Beverages* (June 4th, 1999)

WTO Appellate Body, *US-Clove Cigarettes* (April 4th, 2012).

WTO Appellate Body, *US-COOL* (June 29, 2012).

WTO Appellate Body, *US-Section 211 Appropriations Act*, para. 297 (January 2nd, 2002)

WTO Appellate Body, *US-Tuna II*, para. 297-298 (May 16, 2012).

Only one of 44 attempts to use the GATT Art. XX/GATS Art. XIV "general exception" has ever succeeded: replicating the WTO exception construct will not provide for an effective TTP general exception. Public Citizen. August, 2015.

WTO Appellate Body, *European Communities-Seal Products* (May 22, 2014)

WTO Appellate Body, *US-Shrimp* (October 12, 1998).

WTO Appellate Body, *US-Gasoline* (April 29, 1996).

WTO panel report, *US-Gambling* (November 10, 2004).

WTO panel report, *US-Clove Cigarettes* (September 2nd, 2011).

WTO panel report, *US-Tuna II* (September 15, 2011).