The case for a public interest clause as a general exception in trade agreements

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There has been a steady accumulation of disputes occurring at the interface between international trade law and a variety of other areas of international law, particularly environmental law and human rights law (*Box 1*). These disputes have taken place before WTO panels and the Appellate Body. The interface and the many disputes have increasingly been the subject of discussion within academic, legal and policy communities. Pressure has been building on WTO Members to reconcile the requirements of free trade with the need to safeguard non-trade related aims, particularly those relating to public health, social and labour standards, human rights, food security, culture, cultural diversity and environmental protection. These are frequently referred to as the trade 'linkage' issues.

In order to not compromise the credibility and legitimacy of WTO law, such reconciliation requires more concerted efforts than have hitherto occurred, at both the dispute settlement and negotiating levels.

Box 1

A sample of the accumulating trade disputes raising non-trade issues since WTO law came into force in 1995:

US-Gasoline (1996)
EC-Hormones (1998)
US-Shrimp Turtle (1998)
EC-Asbestos (2001)
US-Shrimp (Art 21.5) (2001)
EC-Sardines (2002)
EC-Tariff Preferences (2004)
EC-Biotech (2006)
Brazil-Tyres (2007)
US-Gambling (2008)
US-Poultry (China) Panel, 2010)
China-Publications (2010)
US-Clove Cigarettes (2011)
China-Raw Materials (2012)
US-Tuna (2012)
US-COOL (2012)
EC-Seal Products (2014)
China-Rare Earths (Panel, 2014)
Australia-Plain Packaging (pending)

1. Background

A common question underlies all trade linkage discussions: what is the appropriate balance between trade-related and legitimate, non-trade-related aims? The reasons this common question pervades discussion are:

- WTO law does not set out principles to guide our understanding of the relationship between it and these other areas of international law.
- Most trading nations are parties to the principal international treaties which impose binding obligations on states in the areas of human rights, environmental protection and cultural protection (*Box 2*).
- Decisions made within the trade law regime affect a wide variety of social values.
- States adopting trade-restrictive measures to fulfil their obligations under international agreements covering other policy matters lack certainty as to the WTO-legality of those measures.

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- Exceptions in trade law relating to such measures are patchy and unsystematic.
- Where trade-restrictive measures implement obligations under non-trade treaties, two different dispute settlement systems may apply, which can lead to jurisdictional conflicts.
- In practical terms, trade law seems to carry greater weight than others. The WTO system has an efficient, binding and essentially enforceable form of dispute settlement. Alternative international legal mechanisms, such as those available in environmental or human rights law or the conciliation procedure in the Cultural Diversity Convention, lack equivalent enforceability.

In this way, the linkage debates have come to be about whether and how to accommodate non-trade concerns in an appropriate manner in WTO agreements and BITs. This requires striking a balance between legitimate non-trade related and trade-related aims. The solutions proposed so far have relied upon achieving detailed consensus separately in relation to each linkage issue; needless to say, none has been acted upon.

Box 2

The trading nations of the world are not only parties to the WTO agreements but, overwhelmingly, they have made commitments to and carry obligations under conventions dealing with other areas of international law. The majority of trading nations are parties to the two central human rights treaties, ICCPR and ICESCR, although with a handful of significant exceptions: US (ICESCR); Singapore (ICESCR and ICCPR); Malaysia (ICESCR and ICCPR); South Africa (ICESCR) and China (ICCPR). Virtually all WTO Member states are Members of the ILO (185 Members), a status which brings with it labour standards obligations. Similarly, virtually all are parties to the Convention on Biological Diversity (195 states parties).

The difficulty in finding consensus originates in the inherent problems of co-ordinating and co-operating at the multilateral level, with information and power asymmetries and no centralised enforcement. These problems are exacerbated when dealing with very complex linkage issues, such as climate change and cultural diversity. Dealing with each linkage issue separately leads to time consuming, costly and complex negotiations to find agreement on the specific definitions required for each.

This paper proposes a way forward, through the adoption of a public interest clause structured as a general exception in the same form as those in GATT Article XX (a), (b) and (d). The proposal side-steps the need for WTO Members and BIT parties to find detailed consensus on each linkage issue. Instead, it offers the legal technique of a public interest exception, the full meaning and application of which will be drawn out over time by appropriate trade panels.

2. A Public Interest General Exception Clause

Why a public interest general exception?

A public interest general exception clause is a solid basis for achieving consensus on the most appropriate balance between trade-related and legitimate, non-trade-related aims within IEL.

- The concept and the scope of the term 'public interest' include both trade-related and non-trade-related values.
- The majority of existing general exceptions in trade agreements concern aspects of the public interest.
- A public interest basis for exception provides a common threshold for, and secures a single, consistent handling of, all linkage issues relating to public interest concerns.
- It also provides flexibility for future developments and reduces the risk of omitting legitimate, but not yet identified, areas.

- It has the advantage of being a general rule, avoiding the problems in attempting to negotiate an exception for each linkage issue.

What is meant by 'the public interest'?

The public interest is already the unstated standard for, and justification underlying, most exceptions in trade law. This is so even though there is no settled definition in international law of the phrase 'public interest'. The concept is clearly a wide one which is capable of covering trade interests as well as linkage issues. A definition is offered by Lok-Sang Ho, as being a reference to the '*ex ante* welfare of the representative individual'. However, the topic is a much debated one in philosophical, political, economic, environmental, human rights and legal circles.

The phrase 'the public interest' already occurs in WTO law; nor are the concepts involved and the application of such a standard entirely new to panels or the Appellate Body. The use of the phrase in the legal texts relates almost entirely to the regulation of transparency and disclosure of confidential information. However, provisions in the AGP recognize the potential existence of justifications based on 'the public interest' for a Member breaching that Agreement generally (Arts XIII(4)(b) and XX(7)(a)) and the Safeguards Agreement recognizes that Members need to consider "the public interest" when considering applying safeguards (Art 3(1)). Article 8(1) of TRIPS, which sets out Principles underlying that agreement, includes that 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.'

What would a public interest general exception clause look like?

As part of the Doha Round, amendments could be made to GATT Article XX and GATS Article XIV. At present, there is no WTO case law on the meaning of the term 'public interest' as it appears in any of the legal texts. The full meaning of the phrase in the context of a general exception would need to be drawn out over time through the settlement of disputes. However, the WTO Member states could consider drafting a brief statement to accompany the new exception, providing conceptual content that way, or they might include a definition within the clause itself.

This paper puts forward two possible approaches. For each, the *chapeau* in its current form would precede the new clause.

Approach 1

A simple addition of a new sub-article (aa) could be made following the *chapeau*, to read:

> (aa) necessary to protect the public interest;

Approach 2

Alternatively, the exception could be in extended form, involving a restructuring of the sub-articles which follow the *chapeau*. In this form, the clause could follow the *chapeau* to cover measures:

> (a) necessary to protect the public interest, including (but not limited to) –
>
> (i) the protection of public morals or maintaining public order;
> (ii) the protection of human, animal or plant life or health;
> (iii) the protection of national treasures of artistic, historic or archaeological value
> (iv) the performance of a Member's own human rights obligations (new)

The clause would then continue, setting out the remainder of the (non-public interest) sub-articles in GATT Article XX (that is, current sub-articles (c), (d), (e), (g), (h), (i) and (j), with adjusted numbering). Again, the states parties might chose to include in the new clause a specific definition of the public interest, such as Ho's '*ex ante* welfare of the representative individual'.

It is suggested that human rights measures be expressly included in the non-exhaustive list. The suggestion is based on the view that a states' respecting, protecting, promoting and fulfilling the human rights of its nationals falls within the accepted, conventional notion of the public interest. In many traditions, the basic social goods which human rights law guarantees are among the most highly valued. Within international law, the nature of human rights and of their corresponding state obligations has been developed in great depth and detail since the end of WW2. While WTO Members' views about human rights differ to some degree, this does not alter the fact that each is required under international law to act in good faith to implement the human rights obligations which it has assumed towards its nationals. States' efforts in these regards should be respected and accommodated.

The public interest exception and prevention of abuse

Case law from the WTO DSB has shown GATT Article XX (and GATS Article XIV) to be highly effective in identifying abusive elements in domestic measures.

The *chapeau* has been demonstrated to be a particularly effective prevention of misuse or abuse of the listed exceptions. Similarly, case law on the necessity test in GATT Article XX (a), (b) and (d) has revealed its effectiveness as a test of authenticity. The analytical structure to determine whether the discriminatory aspect of a measure is 'necessary' involves a suitable process of 'weighing and balancing' -

- The discriminatory aspect must make a contribution to the objective which is 'at least material,' if not closer to 'indispensable' (China-Audiovisuals; China-Rare Earths; China-Raw Materials; Brazil-Tyres; Canada-Wheat; Korea-Beef; EC-Seals).
- The material contribution must be an actual one, supported by (quantitative or qualitative) evidence (China-Audiovisuals; Brazil-Tyres).
- The more important or vital the objective, the easier it will be to establish that the discriminatory aspect is necessary (EC-Asbestos; Canada-Wheat; Korea-Beef).
- The discriminatory aspect must be no more trade-restrictive than necessary (to secure a material contribution) (EC-Seals).
- There must be no alternative which: is less trade-restrictive; is reasonably available; would make the same contribution to the objective; and is more GATT-compliant (EC-Seals; Canada-Wheat; China-Rare Earths; China-Raw Materials; EC-Asbestos; DR-Cigarettes).

Together, the *chapeau*, the necessity test and, indeed, the very term 'public interest' act to limit the scope of the new exception to protection within the Member's or party's own territory, thereby alleviating this key concern of WTO Members.

International investment treaties and a public interest general exception

A similar clause, with the *chapeau* preceding it, could be adopted in BITs and regional investment treaties, referring of course to investment-related measures rather than to trade-related measures.

As with trade law, the concept of the public interest is not new to international investment law, but references (such as in the US Model BIT and the CARIFORUM-EC EPA) are confined to disclosure of confidential information. However, there are references to similar concepts and standards in provisions dealing with expropriation. In particular, the US Model BIT recognizes that expropriation may be legitimate where it is 'for a public purpose' and that non-discriminatory measures taken by a state will not constitute indirect expropriation where they are to protect 'legitimate public welfare objectives, such as public health, safety and the environment…' (Annex B, 4(b)).